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No. 06-502

In The

Supreme Court of the United States

OLIVIER BANCOULT, *et al.*,

Petitioners,

v.

ROBERT S. McNAMARA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When an entire indigenous population was forcibly and inhumanely removed from their island home by the United States and the United Kingdom, and when U.K. courts held that the actions of the U.K. and U.S. governments are justiciable, whether courts can invoke the political question doctrine to hold that there is no subject matter jurisdiction over all such claims, contrary to this Court's holding in *Baker v. Carr*, or whether there should be a discriminating case-by-case analysis as required by *Sosa v. Alvarez-Machain*.

II. Whether a U.S. court, when faced with an authoritative and potentially conflicting decision by a court in another country involving many of the same issues and parties, should as a matter of comity consider the impact of such a decision in assessing the proper role of U.S. courts in transnational litigation.

PARTIES TO THE PROCEEDING

The class of Chagossian claimants and their representatives Olivier Bancoult, Jeanette Therese Alexis, Marie Isabelle France-Charlot, Chagos Refugee Group, and the Chagossians Committee (Seychelles) are Petitioners in this case.

Robert S. McNamara, Donald H. Rumsfeld, Admiral Thomas Moorer, Melvin R. Laird, James R. Schlesinger, George T. Churchill, Admiral James L. Holloway, III, Eric D. Newsom, and the United States of America are Respondents in this case.

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PETITION FOR A WRIT OF *CERTIORARI*

The class of Chagossian claimants and their representatives Olivier Bancoult, Jeanette Therese Alexis, Marie Isabelle France-Charlot, Chagos Refugee Group, and the Chagossians Committee (Seychelles) petition for a Writ of *Certiorari* to review the judgments of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 445 F.3d 427 (D.C. Cir. 2006). The District Court's original opinion is reported at 370 F. Supp. 2d 1 (D.D.C. 2004). The orders of the Court of Appeals denying rehearing and rehearing *en banc* are reported at 2006 U.S. App. LEXIS 17557 (D.C. Cir. 2006) and 2006 U.S. App. LEXIS 17556 (D.C. Cir. 2006), respectively.

STATEMENT OF JURISDICTION

On April 21, 2006, the Court of Appeals affirmed the judgment of the District Court. On July 11, 2006, the Court of Appeals denied the petition for rehearing and rehearing *en banc* without opinion. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the U.S. Constitution provides: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

The Alien Tort Claims Act, 28 U.S.C. § 1350 (2006), provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

A. Procedural History

On November 12, 2002, a class of Chagossian plaintiffs, represented by named plaintiffs Olivier Bancoult, Jeanette Therese Alexis, Marie Isabelle France-Charlot, Chagos Refugee Group, and the Chagossians Committee (Seychelles), filed an amended Complaint alleging forced relocation; torture; racial discrimination; cruel, inhuman, degrading treatment; genocide; intentional infliction of emotional distress; negligence; and trespass in the United States District Court for the District of Columbia against defendants Robert S. McNamara, Donald H. Rumsfeld, Admiral Thomas Moorer, Melvin R. Laird, James R. Schlesinger, George T. Churchill, Admiral James L. Holloway, III, Eric D. Newsom, and the United States of America.[1] Plaintiffs invoked the jurisdiction of the District Court under 28 U.S.C. §§ 1331, 1350, and 1367 (2006). On March 21, 2002, defendants submitted a Motion to Dismiss plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1).

On December 21, 2004, the District Court granted defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and held that the political question doctrine rendered plaintiffs' claims nonjusticiable. *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 17 (D.D.C. 2004).

Plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit on October 3,

[1] The original Complaint included three other defendants (Halliburton Corporation, Brown & Root, Inc., and De Chazal Du Mee) who were dismissed from the case in the amended Complaint.

2005. Plaintiffs argued that their claims did not present a nonjusticiable political question because they did not challenge U.S. policy. Instead, plaintiffs alleged justiciable claims of tortious conduct and international law violations that are clearly within the purview of Article III courts. The Chagossians further argued that defendants' forcible removal of the Chagossians from their homes, which left them in abject poverty in a foreign land, was so egregious that the defendants were not entitled to immunity under the *Westfall* Act.

On April 21, 2006, the Court of Appeals affirmed the dismissal, concluding that "all the claims in this case present nonjusticiable political questions" and that the political question doctrine precluded the Court from exercising subject matter jurisdiction. *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006).

Plaintiffs filed a timely petition for rehearing or rehearing *en banc* on June 5, 2006, arguing that (1) the recent developments in plaintiffs' U.K. litigation necessitate a remand and (2) the panel mistakenly held that the court lacks jurisdiction to hear plaintiffs' claims based on the political question doctrine. The petition was denied on July 11, 2006.

B. Factual Background

Mr. Olivier Bancoult, Ms. Jeanette Therese Alexis, and Ms. Marie Isabelle France-Charlot represent approximately 5,000 men, women, and children who were either born in Chagos or are the direct descendants of native Chagossians. (Pls.' Second Am. Compl. ¶¶ 8, 31-33.) More than two centuries ago, the ancestors of these Chagossians settled Diego Garcia and Peros Banhos. (*Id.* ¶¶ 8, 10.) Since the late 1700s, the Chagossians have nurtured their families, developed their community, and fostered their cultural identity in this remote archipelago. (*Id.* ¶¶ 10-15.) They built houses, schools, places of

worship, and graveyards to make homes for themselves, educate their young, pray to God, and bury their dead. (*Id.*) The Chagossians owned their land, as recorded by the plantation or colonial administrator, and that land passed to their heirs upon death. (*Id.* ¶¶ 12-13.) They built homes on their land from items they bartered for or materials they found on the island. On average, these homes were similar to American homes, with four bedrooms, a kitchen, and a dining room or living room; the Chagossians even had pets. (*Id.* ¶ 14.) Like many American farmers, they cultivated gardens and raised livestock to sustain their families. (*Id.* ¶ 15.) By the mid-1900s, Chagossians enjoyed salaries and benefits that included pensions, vacations, and basic healthcare.[2]

In February 1964, the governments of the United States and the United Kingdom began discussing the possibility of establishing a U.S. military installation in the Chagos Archipelago. (*Id.* ¶ 17.) At the urging of American officials, the British government detached the Chagos Archipelago from the Mauritius colony in November 1965 and created a separate dependent colony, the British Indian Ocean Territory (BIOT).[3] British litigation in recent years has uncovered discussions that preceded the removal of the Chagossians. In its 2006 decision, the British High Court illuminates the British and American strategy:

> 'They' – the Colonial Office – 'wish to avoid using the phrase 'permanent inhabitants' in relation to

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[2] *See* David Vine, *The Impoverishment of Displacement: Models for Documenting Human Rights Abuses and the People of Diego Garcia*, 13 No. 2 Human Rights Brief 21 (2006), *available at* http://www.wcl.american.edu/hrbrief/13/2vine.pdf?rd=1.

[3] *See Queen* ex parte *Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWHC 1038 (Admin.) ¶ 22 [hereinafter *Bancoult II*], *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2006/1038.html.

> any of the islands in the territory because to recognize that there are permanent inhabitants will imply that there is a population whose democratic rights will have to be safeguarded and which will therefore be deemed by the UN Committee of Twentyfour to come within its purview . . . It is . . . of particular importance that the decision taken by the Colonial Office should be that there are no permanent inhabitants in the BIOT.' *Bancoult II*, ¶ 27.

On December 30, 1966, British officials granted use of this territory to the United States for defense purposes; the British government agreed to resettle the Chagossians at the request of the United States. *Id.* ¶¶ 36-38. Fearful that the United Nations and the U.S. Congress would look unfavorably upon the forced removal of the native Chagossians, both governments fraudulently characterized the Chagossians as temporary workers. *Id.* ¶ 29; (Am. Compl. ¶ 20.) Classified documents given to Congress in the early 1970s referred to the Chagossians as "rotating contract personnel," and other documents downplayed the United States' role in removing the inhabitants. *See Diego Garcia, 1975: The Debate Over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcommittee on Investigations of the Committee on International Relations of the House of Representatives,* 94th Cong., 1st Sess. 1-123 (1975); (Am. Compl. ¶ 20.)

From approximately 1965 until 1973, U.S. government officials and their agents forced the Chagossians out of their homes in three distinct phases. First, U.S. officials and their agents prevented Chagossians who had temporarily left the islands from returning, even when their families and most sacred personal possessions remained on the island. (Am. Compl. ¶¶ 21-22.) Second, in a direct effort to starve the Chagossians off the islands, U.S. officials and their agents created an embargo to restrict the flow of food and supplies to Chagos. (*Id.* ¶ 22.) Officials

also directly threatened some individuals with death if they did not leave. (*Id.*) During this stage, officials rounded up all of the Chagossians' pets and gassed them to death, sending a message to the Chagossians that if they did not leave, the Chagossians would be next. (*Id.* ¶ 32(i).) Finally, for those who would not leave under the threat of death and starvation, U.S. officials and their agents corralled them onto overcrowded, unsanitary boats. The last of the Chagossians to inhabit Chagos were forcibly removed from Peros Banhos and Solomon. (*Id.* at ¶ 32(k).) For six days, these Chagossians were forced to live in the cargo compartment with animals or on the upper deck without shelter. (*Id.*) The boat was so overloaded that measures had to be taken to prevent the boat from sinking. (*Id.*) The captain fed the horses on board but starved the Chagossian passengers. (*Id.* ¶ 23.) Upon arriving at Mauritius and the Seychelles, U.S. government officials and their agents deposited the Chagossians without providing them any form of assistance or compensation for their relocation. (*Id.* ¶¶ 22-23.) The Chagossians found themselves in a strange land without shelter and without marketable skills, making it impossible for them to start a new life. (*Id.* ¶¶ 23-24, 28-30.)

Today, more than thirty years after their removal, many Chagossians in Mauritius and the Seychelles continue to live in abject poverty and have few hopes of creating a better life for themselves. (*Id.* ¶ 29.) They share communal shacks with no running water and no toilets, located in neighborhoods too poor to afford waste disposal. (*Id.*) The unsanitary conditions attract rodents and insects, contributing to the spread of disease. (*Id.*) The Chagossians experience ongoing racial discrimination in both the Seychelles and Mauritius, resulting in unequal access to education and employment. (*Id.* ¶¶ 30, 32(n), 33(c)-(g).)

U.S. officials continue to deny the Chagossian people entry to the Chagos Archipelago and employment on the island of Diego Garcia solely on the basis of their ethnic heritage. (*Id.* ¶ 26.) In contrast, the United States routinely hires non-Chagossian laborers from the Seychelles, Sri Lanka, the Philippines, and Mauritius (*Id.* ¶ 26) and regularly permits vacationers and yachters to enter the island chain. *Bancoult II*, ¶ 98. Of approximately 540 Chagossians who have applied for civilian positions on Diego Garcia, only those who did not reveal their Chagossian heritage were able to obtain employment. (Am. Compl. ¶ 26.)

In 2000, the British High Court granted the Chagossians the right to re-enter and remain on any of the islands in the Chagos Archipelago except Diego Garcia. *Bancoult II*, ¶ 80(iv). The British government accepted the British High Court's ruling that repealed the Immigration Ordinance from 1971, which allowed for the detention, removal, and exclusion of the Chagossians from Chagos, because the order could not reasonably be construed to promote the "peace, order and good government" of the BIOT. *Id.* ¶¶ 76, 77, 80(iv), 81.

In 2004, the Queen retracted her support for the British High Court's ruling and issued a new Immigration Order that offered "[n]o right of abode" in the BIOT without a permit. *Id.* ¶¶ 3, 90-93. The new Immigration Order reinstated significant restrictions on access to the Chagos Archipelago for anyone who is not a member of the U.K. or U.S. military. *Id.* Letters from the United States and the United Kingdom supported the Queen's position.

The Chagossians again brought suit in the British High Court and asked for a review of these Orders in Council. *Id.* ¶¶ 4, 99-109. In May 2006, the British High Court held that violations of the Chagossians' rights are justiciable and set aside the challenged Orders in Council,

thereby reinstating the Chagossians' right to return to their homeland. *Id.* ¶¶ 163, 170. The British High Court found that it could adjudicate the Chagossians' claims without making "any assessment of the defense interests of the United Kingdom or United States." *Id.* ¶ 162. The United States participated in the litigation, and the British High Court issued its opinion despite U.S. opposition to the Chagossians' claims. *Id.* ¶ 97. The British government has appealed the High Court's decision.

Unlike their British counterparts, U.S. federal courts have summarily refused to hear the Chagossians' claims. Both the District Court and the Court of Appeals for the District of Columbia Circuit concluded that the Chagossians' claims presented nonjusticiable political questions, thereby denying the Chagossians any effective remedy. *Bancoult*, 445 F.3d 427; *Bancoult*, 370 F. Supp. 2d 1.

REASONS FOR GRANTING THE PETITION

I. THE D.C. CIRCUIT'S USE OF THE POLITICAL QUESTION DOCTRINE TO LIMIT SUBJECT MATTER JURISDICTION CONTRAVENES SUPREME COURT PRECEDENT

The United States consistently rejects the authority of international tribunals, such as the International Court of Justice and the Inter-American Commission on Human Rights, to review U.S. actions for compliance with international law. Instead, the task falls to domestic courts, which are charged with enforcing international law that is incorporated into U.S. law by valid congressional enactments such as the Alien Tort Claims Act (ATCA) and, as a matter of federal common law, rooted in the Constitution itself. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("[F]ederal courts should not recognize private claims under federal common law for violations of any

international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").[4] Domestic courts provide the sole forum in which foreign nationals may seek a binding remedy for harms suffered in violation of international law. By invoking the political question doctrine to bar valid ATCA claims from proceeding against the Executive Branch, U.S. courts circumvent their constitutional duty to resolve cases and controversies, while the United States remains unconstrained in its ability to commit egregious violations of international law. The D.C. Circuit's application of the political question doctrine to the Chagossians' claims sets a dangerous precedent by avoiding a constitutionally delegated duty reinforced by a valid statute.

The D.C. Circuit applied the political question doctrine to limit subject matter jurisdiction, precluding analysis of the particular claims made. The D.C. Circuit also failed to consider the proper analysis for ATCA claims, as set forth by this Court's decision in *Sosa v. Alvarez-Machain*. 542 U.S. 692. Based on this error, the D.C. Circuit dismissed valid claims made pursuant to international law without a proper inquiry into the nature of the international legal framework demanded by the ATCA. The court abdicated its Article III responsibilities by refusing to perform the claim-by-claim analysis required by *Baker v. Carr*. 369 U.S. 186, 217 (1962). In short, the

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[4] Given that international law is exclusively federal, *see Zschernig v. Miller*, 389 U.S. 429 (1968), federal courts are necessarily called upon to construe and apply it.

D.C. Circuit impermissibly expanded the use of a discretionary judicial doctrine in contravention of an express statutory duty. This Court must grant *certiorari* in order to clarify that international law binds the Executive through the ATCA and that courts may not contravene congressional intent through the unwarranted expansion of a judicially created discretionary doctrine.

A. Use Of The Political Question Doctrine To Limit Subject Matter Jurisdiction Is Contrary To Supreme Court Precedent And Other Circuit Courts' Application Of The Doctrine

The D.C. Circuit's practice of limiting subject matter jurisdiction based on the political question doctrine contradicts this Court's decisions and sets a dangerous precedent, potentially endangering the rights of plaintiffs in all federal circuits. The D.C. Circuit prematurely abdicates its responsibility as an Article III court to adjudicate cases and controversies. Rather than scrutinizing each claim individually, with a concerted effort to salvage those issues that are justiciable, the D.C. Circuit takes a "semantic cataloguing" approach and considers all claims that touch on political issues outside of the subject matter jurisdiction of the courts. *Baker*, 369 U.S. at 217. As a result, the D.C. Circuit demonstrates extreme deference to the political branches by uniquely refusing to acknowledge or enforce the legal boundaries within which these branches must operate. Ultimately, the D.C. Circuit bars judicial relief for an entire class of plaintiffs alleging valid human rights claims. This Court must grant *certiorari* to reestablish the Judiciary's role in adjudicating valid claims.

The D.C. Circuit repeatedly confuses discretionary political question justiciability with a lack of federal jurisdiction under Article III. *Bancoult*, 445 F.3d at 432 (describing the political question doctrine as one aspect of

the "jurisdictional limitations placed on the federal courts by the 'case or controversy' requirement of Article III of the Constitution"); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006) (stating that judicial inquiry is preempted by "the presence of a political question, prevent[ing] the power of the federal judiciary from being invoked by the complaining party" (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974)));[5] *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (dismissing an action "for want of jurisdiction" due to the presence of political questions).

This error contradicts the legal principles set forth in *Baker v. Carr*. 369 U.S. 186. In *Baker*, the Court addressed the "significant distinction" between cases dismissed for lack of federal jurisdiction and those dismissed "upon the inappropriateness of the subject matter for judicial consideration," also referred to as "nonjusticiability." *Id.* at 198. A case will fall in the former category if the cause does not arise under the Constitution, laws, or treaties of the United States; if the cause is not a case or controversy within the meaning of Article III, Section 2 of the Constitution; or if the cause is not described by any jurisdictional statute. *Id.* For these cases, consideration of the cause is wholly and immediately foreclosed. *Id.* In contrast, the justiciability determination involves an inquiry that "must

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[5] The D.C. Circuit's use of *Schlesinger* to support its confusion between subject matter jurisdiction and political question justiciability fails for several reasons. The *Schlesinger* Court's dicta on the issue, far from modifying *Baker*'s holding, stands for the proposition that courts may invoke either standing or the political question doctrine to bar claims. *See Schlesinger*, 418 U.S. at 215 (calling the limitations imposed by the standing and political question doctrines "distinct and separate") (citing *Baker v. Carr*, 369 U.S. at 198). The *Schlesinger* Court's holding that the plaintiffs lacked standing did not modify the *Baker* holding separating justiciability from subject matter jurisdiction. *See Schlesinger*, 418 U.S. at 215-16 (declining to discuss justiciability and deciding the case on other grounds).

necessarily proceed to examine whether a duty, its breach, and a remedy can be judicially molded."[6] *Id.* As the "ultimate interpreter[s]" of the Constitution, courts are responsible for conducting a discriminating analysis of the particular questions posed to decide whether another branch has exceeded its constitutionally granted authority. *Id.* at 210-11.

To preserve the power of judicial review in the spirit of *Baker*, most circuits have implemented a surgical approach to evaluating potential political question cases, dissecting and analyzing each claim independently. The Ninth Circuit has declined to "reflexively invoke the doctrine merely because ... claims implicate foreign policy," instead delving into the complaint and separating garden-variety legal and equitable claims from those that are constitutionally committed to another branch or that lack judicially discoverable standards. *See Alperin v. Vatican Bank*, 410 F.3d 532, 545-55 (9th Cir. 2005) (finding plaintiffs' claims of conversion, unjust enrichment, restitution, and accounting for losses suffered at the hands of a Nazi puppet regime during World War II to be justiciable). Likewise, the Eighth Circuit has preserved most of the claims in a seemingly "political case" by removing those claims that are beyond judicial competence. *See Romer v. Carlucci*, 847 F.2d 445, 447 (8th Cir. 1988) (distinguishing

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[6] Although there may be some cases where the matter is so clearly within the province of another branch of government that Article III jurisdiction is lacking, this Court has never expressly limited jurisdiction in this manner. *See Nixon v. United States*, 506 U.S. 224, 253-54 (1993) (Souter, J. concurring) (warning that an impeachment procedure that was outrageously unfair might call for judicial review); *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (finding that the Constitutional provision vesting power in the House of Representatives to judge qualifications of its members did not foreclose judicial review); *see also* C. Wright & M. Kane, Federal Courts §15 (noting that in cases involving most of the *Baker* factors, the political question doctrine is "prudential," not a matter of Article III power).

between closely related claims based on the environmental impact of a proposed missile project and deciding that congressional intent governed the issue of justiciability even in the national security arena); *see also Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (finding narrowly focused claims of tort liability against individual defendants justiciable because they did not require the court to challenge the legitimacy of U.S. foreign policy).

In addition to analyzing claims independently, most circuits preserve the power of judicial review urged in *Baker* by critically analyzing the factual circumstances and remedy requested to determine whether relief can be granted without deciding the "political question." The Second Circuit has found preliminary policy decisions unnecessary for adjudicating suits brought under the ATCA because universally recognized norms of international law provide judicial standards. *Kadic v. Karadzic*, 70 F.3d 232, 248-51 (2d Cir. 1995) (holding that claims of genocide, war crimes, torture, and summary execution against a Bosnian-Serb military leader were justiciable). Similarly, the Fifth and Seventh Circuits have decided that mere potential for conflict with the federal government is insufficient to bar a case. *See Gordon v. Texas*, 153 F.3d 190, 195-96 (5th Cir. 1998) (deciding that the political question doctrine was not applicable to plaintiffs' injunctive and monetary claims related to a government program); *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 349 (7th Cir. 2001) (concluding that the process of Indian Tribal recognition is within the Judiciary's realm because the applicable regulation separates the recognition issue into a series of questions that courts are equipped to answer).

The D.C. Circuit's approach to cases posing potential political questions utilizes none of the measures practiced by other circuits to preserve judicial power. Far from a "discriminating analysis of the particular questioned

posed," *Baker*, 369 U.S. at 211, the D.C. Circuit determines that all claims are nonjusticiable if the general subject matter of the case is political. *See, e.g.*, *Gonzalez-Vera*, 449 F.3d 1260 (holding that the political overtones of a suit against the United States barred review of claims brought by torture victims pursuant to the Torture Victim Protection Act); *Bancoult*, 445 F.3d 427 (asserting that the Cold War context of the case barred resolution of tort claims); *Schneider*, 412 F.3d 190 (stating that tort claims could be dismissed if a court found, based on the political overtones of the case, that the plaintiffs were recasting a policy challenge in tort terms). In *Bancoult*, plaintiffs' claims include torture, forced relocation, trespass, destruction of real and personal property, and discriminatory hiring practices. 445 F.3d at 431. Although property claims, human rights claims, and labor related claims require vastly distinct factual and legal inquiries, the court refrained from separating these claims to perform even an initial analysis. *Id.* at 433. Instead, the court declared that "national security and foreign relations" are topics that serve as "quintessential sources of political questions."[7] *Id.*

The D.C. Circuit described brutal, specific measures taken to depopulate an island as inextricably intertwined with U.S. policy and made no attempt to determine

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[7] The D.C. Circuit catalogues ways in which judicial action might "touch foreign relations yet not encroach on the powers of the political branches," listing a series of questions specifically described in *Baker* as justiciable. *Bancoult*, 445 F.3d at 435 (citing *Baker*, 369 U.S. at 212-13) (noting that courts may properly construe treaties or resolve matters that infringe on fundamental liberties). The *Baker* Court, however, did not intend to compile an exclusive list of justiciable questions involving foreign policy, but rather to demonstrate the type of analysis courts should employ, asking itself in regards to each claim: (1) does it seriously implicate considerations of finality, and (2) are there any clearly definable criteria available? *See* 369 U.S. at 212-17 (rejecting the possibility of "resolution by any semantic cataloguing").

whether judicially recognized standards exist to decide these claims. *Id.* at 429, 436. What is unclear from this line of reasoning is how a tort claim for monetary damages that poses no threat to the existence of the military base would require the Judiciary to make "a policy determination of a kind clearly for nonjudicial discretion." *Id.* at 436 (quoting *Baker*, 369 U.S. at 217). Likewise, resolution of an employment discrimination claim is not "constitutionally committed to the political branches of government," *Alperin*, 410 F.3d at 566, but rather falls within the province of the Judiciary. *E.g., Image of Greater San Antonio v. Brown*, 570 F.2d 517, 520-22 (5th Cir. 1978) (adjudicating plaintiffs' employment discrimination claims against the Department of Defense).

The D.C. Circuit's application of the political question doctrine undermines its purpose of preserving separation of powers by allowing the Executive to encroach on powers constitutionally reserved for the Judiciary. The Supreme Court's recent decision limiting the Executive's use of military tribunals to criminally prosecute prisoners of war, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), demonstrates judicial review with an appropriate level of deference to the coordinate branches of government, "resting on reason not habit," as urged by *Baker*. 369 U.S. at 213. The *Hamdan* Court held that "the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction." 126 S. Ct. at 2798. This ruling is incompatible with the D.C. Circuit's judgment that it cannot "bind the executive's hands" on matters such as the "minimum level of protections" with which Executive action must comport when depopulating an island and constructing a military installation on the islanders' personal property. *Bancoult*, 445 F.3d at 437. By refusing to apply universal standards of international law to adjudicate tort claims, the D.C. Circuit gives the Executive *carte blanche* to violate these standards. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536

(2004) (discussing separation of powers and the need for checks on Executive power).

This Court must step in and delineate the Judiciary's role in reviewing Executive actions. The danger presented by the D.C. Circuit's approach to Executive power is far-reaching. The logic put forth in *Bancoult* allows the courts to deem any action taken as part of an overarching Executive policy non-reviewable. This effectively allows the Executive to adopt policies that promote torture, racial discrimination, and deprivations of due process by framing them as part of a broad Executive mandate such as the War on Terror or, in this instance, the Cold War. Indeed, any action taken by the Executive in the period from 1950 to 1989 could be framed as necessary to Cold War policy, and therefore nonjusticiable. This contravenes the purpose of the ATCA and the function of the Judiciary.

The D.C. Circuit's extreme deference to the Executive not only fails to effectively preserve separation of powers, but also creates an entire class of plaintiffs with valid claims for whom no tribunal can issue a remedy. The U.S. government has never disputed the truth of the Chagossians' claims. In fact, government documents described in plaintiffs' Complaint verify that the events occurred as pled: the United States and United Kingdom, acting in concert, forcibly dislocated a native population and mischaracterized the true nature of the events to the United Nations, the U.S. Congress, and the world audience. (Am. Compl. ¶ 20.) If U.S. federal district courts do not have jurisdiction to adjudicate these claims as the D.C. Circuit maintains, the Chagossians are left with no venue in which to seek justice. The United States will not submit to the jurisdiction of any other tribunal, leaving plaintiffs without a legal means of seeking relief.[8] Despite the

[8] "The United States cooperates with many other nations to keep the peace, but we will not submit American troops to prosecutors and

(Continued on following page)

federal courts' reluctance to recognize these plaintiffs' suffering, their pain persists. In the words of a United Nations Millennium Project leader, "We all know that unaddressed suffering adds greatly to instability and insecurity throughout the world." Jeffrey D. Sachs, *A Practical Plan to End Poverty*, Wash. Post, Jan. 17, 2005, at A17.

B. The D.C. Circuit's Failure To Consider The Supreme Court's Interpretation Of The ATCA Presents A Vital Federal Question

The D.C. Circuit's invocation of the political question doctrine contradicts this Court's precedent relating to the justiciability of claims under the ATCA. This Court's opinion in *Sosa* developed five main arguments for discretion in acting on norms of international law. 542 U.S. at 725-28. Analysis of these arguments demonstrates that the Chagossians' claims are properly before the Judiciary. In neglecting to discuss relevant precedent and instead broadly invoking the political question doctrine, courts fail to conduct the discriminating analysis required by *Baker*. 396 U.S. at 217. Analysis of the *Baker* factors in conjunction with the standards set forth in the *Sosa* decision demonstrates the D.C. Circuit's profound misunderstanding of both this Court's ATCA jurisprudence and of the political question doctrine itself. This Court should clarify the interplay between the "discriminating inquiry" required by *Baker*, 396 U.S. at 217, and the analysis required by *Sosa*. 542 U.S. at 725-28. In addition, this Court

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judges whose jurisdiction we do not accept. . . . Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court." John R. Bolton, Undersecretary for Arms Control and Int'l Sec., Remarks to the Federalist Soc'y (November 14, 2002) (quoting President George W. Bush), *available at* http://www.state.gov/t/us/rm/15158.htm.

should declare that, even where the Executive has committed the breach, international law provides manageable standards for interpretation and application by the Judiciary.

i. Judicially Discoverable And Manageable Standards Exist To Govern This Suit

Customary international law creates discoverable and manageable standards that both domestic and international courts apply. The D.C. Circuit's analysis of manageable standards was inherently flawed. Rather than focusing on the nature, content, and acceptance of the legal norms at issue as commanded by *Sosa*, the D.C. Circuit barred review based on the identity of the actor committing the tort. *See Bancoult*, 445 F.3d at 437 (arguing that courts lack the institutional competence to adjudicate claims addressing the actions of Executive officials). Analysis of this Court's *Sosa* opinion reveals that international law creates judicially manageable standards applicable to the Executive. *See Sosa*, 542 U.S. at 695 (allowing the federal courts to incorporate well-defined standards of international law into the federal common law while acknowledging the likely effect on foreign affairs); *see also Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 935, 941 (D.C. Cir. 1988) (stating that the court can address potential violations of peremptory or *jus cogens* norms committed by the Executive or Congress). By circumventing this Court's analysis in *Sosa*, the rights of an entire class of extraordinarily vulnerable plaintiffs, victims of international human rights violations for whom the ATCA should provide a remedy, are threatened.

The *Sosa* Court noted that federal common law is no longer presumed to be a "transcendental body of law outside of any particular State but obligatory within it

unless and until changed by statute." 542 U.S. at 725 (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Incorporation of customary international law into the federal common law pursuant to *Sosa* is not based on the presumed universality of a transcendental common law, but rather on the *actual* universal acceptance of certain norms of international law. *See Sosa*, 542 U.S. at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"). These norms, far from deriving from a conception of transcendental "natural law," are grounded in state practice and a sense of legal obligation. *See The Paquete Habana*, 175 U.S. at 700 (stating that "[i]nternational law is a part of our law, and must be ascertained and administered by the courts of justice"); *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 60-82 (Feb. 20) (defining customary international law as a combination of state practice and *opinio juris*).

The ultimate rule with which courts must comply in an action brought pursuant to the ATCA thus will satisfy the political question doctrine's concern for "manageable standards" by analyzing whether the customary norms in question have "definite content and acceptance." *Sosa*, 542 U.S. at 732. Rather than undertaking an analysis of the content and acceptance of the individual claims enunciated in the complaint, the D.C. Circuit broadly dismissed all of the claims, citing a lack of "manageable standards." *See Bancoult*, 445 F.3d at 434-36 (stating that foreign policy challenges are barred for lack of manageable standards and that to resolve the issues presented in this case would require the court to delve into foreign policymaking)

(citing *Baker*, 369 U.S. at 217). To conduct the appropriate analysis according to *Sosa*, however, courts must inquire as to whether each claim has "definite content and acceptance" under international law; any claim that meets this high standard, as the Chagossians' claims do, will satisfy the political question doctrine's lower "manageable standards" threshold. The "definite content and acceptance" of these norms and their certain application to government action reveals the weakness of the argument that U.S. courts lack the "institutional competence" to apply international law to the Executive. *See Bancoult*, 445 F.3d at 437. If a norm is acceptable under the *Sosa* standards, it will necessarily meet the requirements of the second *Baker* factor. Therefore, the D.C. Circuit subverted the necessary claim by claim analysis required under *Sosa* by broadly invoking the political question doctrine.

In *Bancoult*, the D.C. Circuit cited the recent opinion in *Schneider v. Kissinger*, 412 F.3d 190, for the proposition that cases seeking to "recast" challenges to foreign affairs in tort terms were nonjusticiable because of a lack of "judicially discoverable and manageable standards." *See Bancoult,* 445 F.3d at 434. Foreign policy decisions, according to the D.C. Circuit, are "wholly confided by our Constitution to the political departments." *Id.* at 433 (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). Attempts to equate policy and its implementation, however, do not withstand analysis for purposes of the political question doctrine. Policy challenges are barred because courts cannot constitutionally formulate this nation's foreign policy; moreover, courts do not have standards they can apply across the board to determine which policies would be appropriate. *See Chi. & S. Air Lines*, 333 U.S. at 111 (arguing that the Judiciary lacks both the ability and accountability to exercise discretion over foreign policy decisions). Unlike cases requiring policymaking, however, tort claims are governed by legal

standards that courts are uniquely capable of discovering and applying.

The damages suffered here are actionable pursuant to specifically defined violations of international law incorporated into federal law by a valid congressional statute. *Sosa*, 542 U.S. at 732. Courts are not deprived of manageable standards for tort claims based on *who committed* the acts in question. This "recasting" standard bars plaintiffs from bringing tort claims against the government whenever a court decides the alleged acts appear politically motivated. *Baker* itself proves the error of this application, holding "the doctrine of which we treat is one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217 (continuing, "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority"). Barring tort claims on these arbitrary grounds jeopardizes a valid class of actions for serious harm, such as that suffered by the Chagossians.

ii. The Issues Addressed In This Suit Are Not Constitutionally Committed To A Coordinate Branch Of Government

The D.C. Circuit erred in determining that the issues underlying the Chagossians' claims were constitutionally committed to the Executive, subverting even those ATCA claims not brought against the United States. The ATCA explicitly gives the Judiciary the right to uphold violations of international law, which are nearly always committed by state actors. Indeed, *Sosa* laid out standards for evaluating violations of international law to ensure that their enforcement does not improperly infringe on the power of the political branches. *See* 542 U.S. at 724-28 (requiring analysis of specific separation of powers issues). By substituting a broad invocation of the political question doctrine for the individualized analysis required by *Sosa*, the D.C.

Circuit again muddles the boundaries that international law places on Executive action. *Cf. Hamdan*, 126 S.Ct. at 2753, 2756 (reversing the D.C. Circuit's holding that "the Geneva Conventions are not judicially enforceable," that "Hamdan is not entitled to [Geneva Convention] protections," and that comity concerns counseled in favor of judicial abstention). This Court should grant *certiorari* in order to clarify the proper adjudication of claims under the ATCA in accordance with separation of powers principles; intervention is necessary to protect an entire class of claims from improper abdication of judicial authority.

The *Sosa* Court explicitly discussed the concern that application of the ATCA might threaten separation of powers. *Sosa*, 542 U.S. at 724-28. Specifically, the Court stated that the role of the federal courts in creating and applying "federal general common-law" has changed in the aftermath of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and that the decision to create a private right of action is better left to legislative judgment. *Sosa,* 542 U.S. at 726-27. In addition, the Court found no explicit congressional mandate to seek out "new and debatable violations of the law of nations." *Id.* at 728. These concerns significantly overlap with several *Baker* factors, including those that bar courts from performing actions constitutionally committed to other branches of government and those that forbid the Judiciary from making policy decisions.

According to the D.C. Circuit, the methods used to remove the Chagossians are beyond review because the conduct of foreign affairs is constitutionally committed to the Executive: "If we were to hold . . . that the executive's actions . . . had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence." *Bancoult,* 445 F.3d at 437. This analysis confuses the conduct of foreign affairs with post-hoc judicial determination of harm. *Sosa* states that the federal courts are equipped to determine

whether norms of international law meet the high standard for incorporation into federal common law. 542 U.S. at 732. Determining the level of legal protection afforded to individuals by international law is clearly within the province of Article III courts. Adjudication of these issues is committed to the Judiciary, which cannot abdicate responsibility solely because their resolution requires application of binding law to the U.S. government.

The application of international law by U.S. courts against their own government cannot be said to implicate political question concerns. In its opinion, the D.C. Circuit cited the potential effects on foreign policy decisions. *See Bancoult*, 445 F.3d at 437 (stating that "the specific steps taken to establish the base did not merely touch on foreign policy, but rather constituted foreign policy decisions themselves"). Judicial claims that discretionary doctrines must be invoked to shield all Executive action from legal review misapprehend the role of the Judiciary in foreign affairs. *Cf. Hamdan*, 126 S.Ct. at 2793-98 (applying standards of international law derived from Common Article III of the Geneva Conventions to decide whether Executive action against an "enemy combatant" was within the bounds of the law); *Hamdi*, 542 U.S. at 536 (recognizing that "whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when civil liberties are at stake"); *Rasul v. Bush*, 542 U.S. 466 (2004) (demonstrating that federal courts have jurisdiction to narrowly review the Executive's decisions when they relate to the detainment of foreign nationals). The Executive is constrained by the standards of international law, as incorporated into U.S. law by the Constitution and statutory enactments, even during the gravest of international conflicts.

A grant of *certiorari* would allow this court to make clear that the ATCA explicitly allows tort claims against the Executive. Indeed, rather than applying to individuals, customary international law traditionally binds states to respect and uphold basic human rights norms. By allowing the Executive to violate these norms, courts undermine the application of international law in this nation's courts. The Executive should be accountable for its violations of customary international law in accordance with the mandate of the ATCA and this court's precedent, which make clear that customary international law is "a part of our law . . . [that] must be ascertained and administered by the court of justice." *The Paquete Habana*, 175 U.S. at 700. It is this Court's responsibility under a separation of powers analysis to hold the Executive responsible for breaching these well-respected standards.

II. THE D.C. CIRCUIT'S REFUSAL TO COORDINATE WITH THE BRITISH HIGH COURT OR CONSIDER THE BRITISH HIGH COURT DECISION CONTRAVENES THIS COURT'S STATEMENTS REGARDING COMITY AND DEMONSTRATES A NEED FOR GUIDANCE AS TO THE PROPER JUDICIAL APPROACH TO TRANSNATIONAL LITIGATION

The Court of Appeals issued its opinion on April 21, 2006, extolling the historic U.S.-British military cooperation in support of its decision that the court lacked subject matter jurisdiction because the case was nonjusticiable. *Bancoult*, 445 F.3d at 438. Just twenty days later, the British High Court issued a decision in parallel litigation that acknowledged the justiciability of the claims, noted U.S. participation in the U.K. litigation, and criticized the United Kingdom for its lack of candor and the United States for overstating its security concerns. *Bancoult II*, ¶¶ 96-97. In their petition for rehearing, petitioners noted

the U.K. decision and urged that U.S. courts act in the spirit of comity to keep this case alive as part of an orderly transnational review of these important issues. (Pls.' Reh'g Pet. 8-9.) Perhaps on the mistaken view that it had no subject matter jurisdiction, the Court of Appeals denied the petition for rehearing. The D.C. Circuit's summary dismissal of the Chagossians' rehearing petition is so egregious that it demands reversal and remand to the District Court.

In deciding the Chagossians' case, the courts in the D.C. Circuit failed to take into account parallel litigation in the United Kingdom. This is especially confounding in light of the U.S. participation in the U.K. litigation. *See Bancoult II*, ¶ 96-97 (exploring the extent and nature of the U.S. Department of State's involvement in the U.K. litigation). Given that the two proceedings are interrelated and that the United States prepared for and participated in the U.K. hearings to protect its interests, the D.C. Circuit should have considered those proceedings. Because of the transnational nature of the litigation, the Chagossians cannot have complete relief without the involvement of both nations' courts. When a court decides to use the political question doctrine to dismiss claims rather than consider the applicable transnational norms, a dissonance is created between two competent judiciaries, leading to problems in international cooperation. The District Court failed to communicate with the British High Court to ensure judicial coordination. In addition, the Court of Appeals, when made aware of the British High Court's decision, failed to remand the case to the District Court for the chance to review the claims in light of the favorable British High Court decision.

The D.C. Circuit's lack of cooperation with the British Judiciary conflicts with this Court's long-standing support of judicial comity. The D.C. Circuit's lack of respect for the

principle of comity among nations presents a danger to the international judicial community, as it leads to an imbalanced international legal order and creates difficulties in the enforcement of judicial remedies both at home and abroad. This problem would be best solved through a grant of *certiorari* in order for this Court to provide guidance to the Circuits on the issue of transnational judicial cooperation and to reinforce this Court's commitment to the principle of comity among nations.

A. The D.C. Circuit Did Not Consider The Ruling Of The British High Court In Accordance With Notions Of Comity

Comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Comity addresses important concerns about the role of courts in a globalized world. As litigation becomes less territorially based, courts are involved in an interlocking transnational system in which judges must ask how to enforce U.S. law while respecting the laws of foreign judicial bodies. Courts therefore must take into consideration how different judicial bodies relate to each other and relate to individual claims "to avoid the over-imposition of U.S. norms to transnational disputes." Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 Tulsa J. Comp. & Int'l L. 101 (2004).

Comity required the D.C. Circuit to remand this case to the District Court for proper attention to the British High Court's judgment. The D.C. Circuit should have viewed the decision as "prima facie evidence, at least . . . of the truth of the matter adjudged." *Hilton*, 159 U.S. at 123. Ultimately, "the general comity, utility, and convenience of

nations have . . . established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution." *Id.* at 166 (quoting Wheat. Int. Law (8th Ed.) § 147). By ignoring principles of comity, the D.C. Circuit acted contrary to the judgment of a competent judicial organ of the United Kingdom. Out of respect for the "friendly intercourse between . . . sovereignties," and in light of Great Britain's historic alliance with the United States, the D.C. Circuit should have considered the British litigation as prima facie evidence of the Chagossians' claims. *Hilton*, 159 U.S. at 165.

The U.S. government participated in the British litigation, showing acceptance of the British Judiciary's competence in this matter. *Bancoult II*, ¶ 96-97. The British High Court's decision states that the U.S. government was involved in the litigation and wrote at least two letters to the court to assist the United Kingdom in its defense. *Id.* ¶ 97. Based on U.S. participation in the litigation, the D.C. Circuit could have determined that the British judgment was conclusive as to the veracity of the Chagossians' claims. *See Montana v. United States,* 440 U.S. 147, 154 (1979) ("One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record") (internal citation omitted).

Moreover, the decision of the British High Court would have proven highly determinative in the U.S. litigation had the D.C. Circuit upheld principles of comity. The U.S. government has repeatedly argued that the islands are sovereign territory of the British government and that U.S. courts cannot act alone to remedy the wrongs committed. (Appellees' Br. 9, 26) (stating, "the United States by itself has no authority to grant plaintiffs the access they seek. Diego Garcia and the Chagos

Archipelago remain under the exclusive sovereignty and control of the British Government") (emphasis added). But to say that the U.S. courts cannot act alone is no basis for arguing that they should not act at all, much less for a blanket assertion that they lack the constitutional power to do so. The U.S. government has also argued that the British government controls the immigration and regulation of the Chagos Archipelago and that the British government's security concerns govern the Chagossians' continued exclusion from the islands. (Appellees' Br. 9-11, 26.) Respect for the British High Court's recent judgment would allow the United Kingdom to control its sovereign territory and allow British citizens to return to their homeland.

B. The Court Of Appeals And The District Court Failed To Cooperate With British Courts In This Transnational Litigation

Transnational litigation necessarily involves cooperation among judiciaries so that domestic judicial decisions facilitate the functioning of an integrated international judicial system. As Justice Blackmun stated, "When there is a conflict [between domestic and foreign law], a court should seek a reasonable accommodation . . . that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part, dissenting in part). Indeed, this court has stressed the importance of allowing domestic and foreign laws to work together in harmony, especially in today's globalized world. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) (acknowledging a rule of statutory construction that "helps the potentially conflicting laws of different nations work together in harmony – a harmony

particularly needed in today's highly interdependent commercial world"). Justice Breyer confirmed the importance of international judicial cooperation while sitting on the First Circuit when he stated that the appropriate inquiry for judges is how to "help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Inv. Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991). Courts should coordinate their efforts to enforce legal decisions in international disputes.

All three branches of the U.S. government have demonstrated a commitment to facilitating international judicial cooperation. Not only has the Executive adopted a policy of promoting transnational judicial cooperation through the U.S. State Department's ratification of treaties concerning international judicial cooperation,[9] the Court has also stated that the legislature should adopt laws that are in conformity with "the legitimate sovereign interests of other nations." *F. Hoffman-La Roche*, 542 U.S. at 164; *see also Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("A[n] act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). U.S. courts must promote the integration of the United States into the international

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[9] The State Department has ratified The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *adopted* Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231, *codified at* 28 U.S.C. § 1781 (Supp. 1979); The Hague Convention on The Service Abroad of Judicial and Extrajudicial Documents, *entered into force* Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163, *reprinted in* 28 U.S.C. Fed. R. Civ. P. 4, app. at 138 (2006); The Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents, *entered into force* with respect to the United States Oct. 15, 1981, 33 U.S.T. 883, 527 U.N.T.S. 189; *see* Int'l Inst. for the Unification of Private Law, Membership, www.unidroit.org/english/member/main.htm (last visited Sept. 26, 2006) (showing that the United States is a member in the U.N.'s International Institute for the Unification of Private Law).

community by following principles of comity and judicial cooperation.

Lack of judicial cooperation creates a legal order without enforceable remedies, contributes to judicial inefficiency, and compromises judicial integrity. From the outset of this litigation, petitioners have kept the U.S. courts apprised of significant developments in parallel litigation in the United Kingdom. (Am. Compl. ¶ 8); (Pls.' Reh'g Pet.) The plaintiffs have consistently recognized that only an authoritative ruling or settlement that involved both the United Kingdom and the United States can resolve the Chagossians' claims. (Pls.' Reh'g Pet. 8-9.) In summarily denying rehearing, the D.C. Circuit failed to provide necessary judicial cooperation. Where control over the Chagos Archipelago lies in the hands of both the United States and the United Kingdom, judicial cooperation and communication are necessary to facilitate enforceable remedies. Judicial communication is necessary for credibility within the international legal order.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant this petition.

Respectfully submitted,

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445 F.3d 427

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 16, 2006 Decided April 21, 2006

No. 05-5049

OLIVIER BANCOULT, ET AL.,
APPELLANTS

v.

ROBERT S. MCNAMARA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv02629)

Darrell Chichester, student counsel, argued the cause for appellants. With him on the brief was Michael E. Tigar. Aaron Lloyd, Ali A. Beydoun, Christine Parsadaian, Courtney J. Nogar, Debra L. Spinelli-Hays, Emily Creighton, James B. Cowden, Jennifer Dodenhoff, Karen Corrie, Laura Rotolo, Melissa Mandor, and Timothy L. Foden, student counsel, entered appearances.

Mark R. Freeman, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Daniel Meron, Acting Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, and Mark B. Stern, Attorney. Dana J. Martin, Attorney, entered an appearance.

Before: TATEL, BROWN and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: In this case, we confront serious allegations involving events occurring forty years ago on the far side of the world. Appellants claim the United States government forcibly removed them from their homes on islands in the Indian Ocean in order to construct a military base. The district court dismissed all of Appellants' claims against the United States and the individual defendants. We affirm the district court's decision, finding that Appellants' claims present nonjusticiable political questions.

I

In his historic speech at Westminster College on March 5, 1946 – the speech in which he first warned that an "iron curtain" had descended over Europe – Sir Winston Churchill described the "special relationship between the British Commonwealth and Empire and the United States." Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill 301 (David Cannadine ed., 1989). Facing a looming Communist threat, Churchill argued that a key component of this special relationship needed to be military cooperation between the two nations, cooperation that included "joint use of . . . Naval and Air Force bases." *Id.* The dispute we address today arose from one of many instances in which Churchill's call to collaboration was heeded: the construction of the United States Navy Support Facility Diego Garcia in the British Indian Ocean Territory (BIOT).

The Chagos Archipelago, including the island of Diego Garcia, is located in BIOT; the British have controlled these islands since 1814. Appellants Olivier Bancoult,

Jeanette Therese Alexis, and Marie Isabelle France-Charlot claim to be indigenous people of Chagos and the direct descendants of indigenous Chagossians. Appellants Chagos Refugee Group and Chagos Social Committee are non-profit associations that work to further the welfare of the Chagossians. Appellants allege that, in 1964, the British and American governments began secretly negotiating the establishment of a U.S. military base in the Indian Ocean; following the "Anglo-American survey," the governments decided upon Diego Garcia as the location for this base. According to Appellants, the two countries decided to depopulate the entire archipelago, obscuring the true nature of their decision by portraying the islands' inhabitants as seasonal contract workers from Mauritius and Seychelles rather than permanent citizens of BIOT.

As described by Appellants, the depopulation of the islands occurred in three stages. First, beginning in 1965, Chagossians who traveled outside the archipelago were not allowed to return. Next, the United States allegedly placed an embargo on the islands to prevent the delivery of food supplies in order to starve the inhabitants out of the islands. According to Alexis, residents were threatened with death if they did not leave, and all the cats and dogs on Diego Garcia were slaughtered. In the third stage, Appellants claim, the remaining inhabitants of Diego Garcia were forced onto ships and sent to other islands in the archipelago; the entire population of the archipelago was removed two years later. Alexis claims the Chagossians were not fed during the six-day sea voyage in harsh conditions; she states that her mother was pregnant at the time of the journey but miscarried the day after arriving in Seychelles.

Appellants contend the Chagossians were stranded in Mauritius and Seychelles without housing, employment, or other assistance, and have been denied the right to return to Chagos ever since. Instead, Appellants state, they have been forced to live in abject poverty in a foreign land, separated from their family graves and native community. Appellants claim that they have become ill by being exposed to diseases unknown in Chagos and by living in impoverished and squalid conditions. Bancoult states that his brother committed suicide due to the frustration of not being able to provide for his family in Mauritius. Appellants claim their real and personal property on Diego Garcia was destroyed during the construction of the military base. Finally, Appellants claim that the United States has discriminated against them in its hiring practices at the Diego Garcia base, hiring laborers from Mauritius, Seychelles, Sri Lanka, and the Philippines but refusing to hire any Chagossians (other than a few who concealed their ethnic heritage).

II

Appellants filed suit against the United States on December 20, 2001, on behalf of themselves and all similarly situated Chagossians, seeking compensatory and punitive damages as well as declaratory and injunctive relief.[1] Several current and former senior officials in the

[1] *See also R. v. Sec'y of State for Foreign & Commonwealth Affairs (Ex parte Bancoult)*, Q.B. 1067 (2000) (striking down British immigration ordinance preventing the Chagossians from returning to BIOT). In 2004, the Queen issued two Orders in Council overruling the High Court's decision and "restor[ing] full immigration control over all the islands" of BIOT. *See* Written Ministerial Statement of Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, 422 Parl.

(Continued on following page)

Departments of Defense and State were also named as defendants under the Alien Tort Statute, 28 U.S.C. § 1350; the Chagossians claimed that these officials knew or should have known of the decisions regarding depopulation and base construction and had direct authority over those who carried out the actions that harmed the islanders.[2] The Chagossians' claims included forced relocation; torture; racial discrimination; cruel, inhuman, or degrading treatment; genocide; intentional infliction of emotional distress; negligence; trespass; and destruction of real and personal property.

The United States and the individual defendants filed motions to dismiss, which the district court granted on December 21, 2004. *Bancoult v. McNamara*, 370 F. Supp. 2d 1 (2004). The court began by addressing the claims against the individual defendants, granting those defendants immunity under the Westfall Act, 28 U.S.C. § 2679. *Bancoult*, 370 F. Supp. 2d at 6-10. Under the Westfall Act, if the Attorney General certifies that an employee of the federal government was "acting within the scope of his office or employment" at the time of an incident, any claims arising out of that incident are converted into claims against the United States under the Federal Tort Claims Act (FTCA). *Id.* at 6 (quoting 28 U.S.C. § 2679(d)(1)). The Attorney General so certified, and the district court found that the Chagossians did not rebut the certification or show that an exception to Westfall immunity should apply.

Deb. (Hansard), H.C. (2004) 32-34WS, *available at* http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040615/wmstext/40615m03.htm.

[2] Three other defendants – Halliburton Corporation, Brown & Root, Inc., and De Chazal Du Mee – were dismissed from the case and are not involved in this appeal.

Id. at 10. Hence, the claims against the individual defendants were converted into FTCA claims against the United States. *Id.* The district court then dismissed these claims, finding that the Chagossians had failed to exhaust their administrative remedies, as required by 28 U.S.C. § 2675(a), and that the claims would be barred because the injuries were suffered on foreign soil, an exception established by 28 U.S.C. § 2680(k). *Id.* at 10-11 & n.8.

Next, the district court turned to the political question doctrine, dismissing the remaining claims against the United States for lack of subject matter jurisdiction. *Id.* at 12-17. Applying the factors enumerated in *Baker v. Carr,* 369 U.S. 186 (1962), the court found that (1) the "conduct of military operations and foreign policy complained of in this case" was the exclusive province of the political branches, *Bancoult,* 370 F. Supp. 2d at 15; (2) the court lacked adequate standards by which to judge the "foreign policy and national security concerns" involved in the case, *id.*; (3) the court could not appropriately "determine the national defense needs of the U.S. military in the Indian Ocean," *id.* at 16; (4) entertaining the Chagossians' claims would require the court to condemn the actions of Congress and the executive, showing a lack of respect for the political branches, *id.*; (5) unquestioning adherence to the political branches' decision to construct the military base was required, *id.* at 17; and (6) disturbing the government's "single voice" on this issue would subject all three branches to potential embarrassment, *id.*[3]

[3] The court also denied the Chagossians' request for a preliminary injunction, finding the request moot in light of the dismissal of all claims against the United States and the individual defendants. *Id.*

III

We begin our discussion by clarifying the sequence in which we must address the issues raised. The "first and fundamental question" that we are "bound to ask and answer" is whether the court has jurisdiction to decide the case. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 453 (1900)). "The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (brackets omitted) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan,* 111 U.S. 379, 382 (1884)). Therefore, a court must "address questions pertaining to its or a lower court's jurisdiction before proceeding to the merits." *Tenet v. Doe,* 125 S. Ct. 1230, 1235 n.4 (2005).

As we recently stated, "the courts lack jurisdiction over political decisions that are by their nature 'committed to the political branches to the exclusion of the judiciary.'" *Schneider v. Kissinger,* 412 F.3d 190, 193 (D.C. Cir. 2005) (quoting *Antolok v. United States,* 873 F.2d 369, 379 (D.C. Cir. 1989) (opinion of Sentelle, J.)). The political question doctrine is one aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement" of Article III of the Constitution. *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 215 (1974); *see also Hwang Geum Joo v. Japan,* 413 F.3d 45, 47-48 (D.C. Cir. 2005). As we find this issue to be dispositive, we do not reach any other jurisdictional issues, such as sovereign immunity, nor the merits of Appellants' claims.

IV

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker,* 369 U.S. at 210. The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 (1986). The framework laid out by the Supreme Court in *Baker* has become the authoritative taxonomy of the characteristics of political questions:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. "To find a political question, we need only conclude that one factor is present, not all," *Schneider,* 412 F.3d at 194, but "[u]nless one of these formulations is inextricable from the case at bar," we may not dismiss the claims as nonjusticiable under the political question doctrine, *Baker*, 369 U.S. at 217.

The instant case involves topics that serve as the quintessential sources of political questions: national security and foreign relations. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee,* 453 U.S. 280, 292 (1981). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 302 (1918). Foreign policy decisions

> are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). "In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives." *Pauling v. McNamara,* 331 F.2d 796, 799 (D.C. Cir. 1963).[4] Thus, "[t]he fundamental division of authority and power established by the Constitution precludes

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[4] *See also id.* (recognizing that judges cannot "regard [themselves] as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people").

judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive." *Luftig v. McNamara,* 373 F.2d 664, 665-66 (D.C. Cir. 1967) (per curiam).

We recently discussed the *Baker* framework at length in *Schneider,* which involved claims brought against the United States and former National Security Advisor Henry Kissinger for the alleged kidnapping, torture, and death of a Chilean general. 412 F.3d at 191. The plaintiffs in that case alleged that the United States had encouraged a military coup in Chile and that General Schneider was "neutralized" in order to allow the coup to succeed. *Id.* at 192. We found that "most" of the *Baker* factors were present in the case, indicating that the political question doctrine rendered the claims nonjusticiable. *Id.* at 194.

Regarding the first *Baker* factor, we compiled an extensive list of constitutional provisions that entrusted foreign affairs and national security powers to the political branches:

> Article I, Section 8 of the Constitution provides an enumeration of powers of the legislature. That article is richly laden with delegation of foreign policy and national security powers. Direct allocation of such power is found in Section 8, Clause 1, "the Congress shall have the Power To . . . provide for the Common Defence . . . "; Clause 3, "To regulate commerce with foreign nations"; Clause 10, "To define and punish Piracies and Felonies committed on the High Seas and Offenses against the Law of Nations"; Clause 11, "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; Clause 12, "To raise and

support Armies . . . "; Clause 13, "To provide and maintain a Navy"; Clause 14, "to make Rules for the Government and Regulation of the land and naval Forces"; Clause 15, "To provide for calling forth the Militia to . . . repel Invasions"; Clause 16, "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."

In addition to these direct allocations to the Congress of these foreign relations and national security powers, other sections and clauses of Article I bear on the subject. . . . For example, Section 9 of Article I provides for the suspension of the writ of habeas corpus "when in cases of . . . invasion the public safety may require it." Section 10 allocates to the Congress the authority to provide consent to individual states, without which they may not "enter into any Agreement or Compact with . . . a foreign Power, or engage in War. . . ." This is not to mention the perhaps less direct but undeniably real connection between national security and other powers of Congress, such as that under Article I, Section 8, Clause 1, to "lay and collect Taxes," and Clause 2, to "borrow money on the credit of the United States."

Just as Article I of the Constitution evinces a clear textual allocation to the legislative branch, Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive. Article II, Section 2 provides, *inter alia,* that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ." That same section further provides that the President "shall

> have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . [and to] appoint Ambassadors, other public Ministers and Consuls." Section 3 of Article II provides that "he shall receive Ambassadors and other public Ministers . . . and shall Commission all the Officers of the United States," including obviously the officers of the military.

Id. at 194-95. We noted that the only analogous provision regarding the judiciary is Article III, Section 1, which extends our jurisdiction to "Cases affecting Ambassadors, other public Ministers and Consuls." *Id.* at 195. After establishing this constitutional commitment of foreign policy to the political branches, we found that the plaintiffs' allegations fell squarely within this realm of exclusivity: "[A]t the height of the Cold War, officials of the executive branch . . . determined that it was in the best interest of the United States to take such steps as they deemed necessary" to combat the spread of communism in the Western Hemisphere. *Id.*

Regarding the second *Baker* factor, we found "a lack of judicially discoverable and manageable standards" for resolving the claims. *Id.* at 196. We could not "recast[] foreign policy and national security questions in tort terms," as that would require the court "to define the standard for the government's use of covert operations in conjunction with political turmoil in another country." *Id.* at 197. The third *Baker* factor implicated a similar yet antecedent problem: the court would be unable as an initial matter "[t]o determine *whether* drastic measures should be taken in matters of foreign policy and national security," *id.* (emphasis added), let alone define standards for evaluating those measures. Finally, we briefly noted the presence of the fourth *Baker* factor, finding that we

would express a lack of respect to a coordinate branch of government if we passed judgment on the executive's decision to participate in the alleged covert operations. *Id.* at 198.

V

We recognize that "the contours of the [political question] doctrine are murky and unsettled." *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (opinion of Bork, J.). Although the judiciary properly defers to the political branches in most such cases, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker,* 369 U.S. at 211. Not every political case presents a political question. The *Baker* Court provided several examples of ways in which judicial action might "touch[ ]" foreign relations yet not encroach on the powers of the political branches, such as by construing treaties or prior executive statements in order to resolve disputes between private parties. *Id.* at 212-13. In *Population Institute v. McPherson,* 797 F.2d 1062 (D.C. Cir. 1986), and *DKT Memorial Fund, Ltd. v. Agency for International Development,* 810 F.2d 1236 (D.C. Cir. 1987), we noted that an indirect effect on foreign affairs would not automatically render a case nonjusticiable. *Population Institute* involved a challenge to an administrative interpretation of an appropriations act that provided funding for international family planning organizations. 797 F.2d at 1066-67. We found the executive's interpretation of the act to be reviewable despite the possibility of a "vague impact" on foreign affairs; although foreign policy judgments were implicit in the process of disbursing the appropriated funds, the interpretation of the act itself was not a political question.

Id. at 1070. Similarly, in *DKT Memorial,* we found that a challenge to an agency's implementation of a policy statement was justiciable, as the plaintiffs did "not seek to litigate the political and social wisdom" of the policy. 810 F.2d at 1238. Thus, in both of those cases, we undertook "a discriminating analysis of the particular question posed"; based on the specific facts and claims at issue, we found the cases to be justiciable, even though they "touche[d]" upon foreign relations issues. *Baker,* 369 U.S. at 211. In the same way, claims based on "the most fundamental liberty and property rights of this country's citizenry," such as the Takings and Due Process Clauses of the Fifth Amendment, are "justiciable, even if they implicate foreign policy decisions." *Comm. of U.S. Citizens Living in Nicar. v. Reagan,* 859 F.2d 929, 935 (D.C. Cir. 1988) (quoting *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *vacated on other grounds,* 471 U.S. 1113 (1985), and citing *Regan v. Wald,* 468 U.S. 222 (1984) and *Dames & Moore v. Regan,* 453 U.S. 654 (1981)). Accordingly, "a challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President" could be justiciable, even if other challenges to the policy or its implementation might be barred. *Schneider,* 412 F.3d at 198 (citing *DKT Mem'l,* 810 F.2d at 1238). Yet even though attenuated connections to foreign affairs do not prevent judicial review, and constitutional mandates may require it, generally "attacks on foreign policymaking are nonjusticiable." *DKT Mem'l,* 810 F.2d at 1238 (citing *Population Inst.,* 797 F.2d at 1068-70).

VI

Appellants concede, and we agree, that the decision to establish a military base on Diego Garcia is not reviewable. Appellants' Br. at 15. That decision was an exercise of the foreign policy and national security powers entrusted by the Constitution to the political branches of our government, and we could not reexamine the choice without making a "policy determination of a kind clearly for nonjudicial discretion." *Baker,* 369 U.S. at 217. Executive branch officials "determined that it was in the best interest of the United States," *Schneider,* 412 F.3d at 195, to gain a military presence in the Indian Ocean; they achieved this goal through negotiations with the British, a process into which the courts may not interject their judgment. *See United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-20 (1936). As the district court stated, we have no "standards by which [we] can measure and balance the foreign policy considerations at play in this case, such as the containment of the Soviet Union in the Indian Ocean thirty years ago and . . . the support of military operations in the Middle East" today. *Bancoult,* 370 F. Supp. 2d at 15. If that decision is to be reconsidered, "the people are and must be, in a sense, at the mercy of their elected representatives." *Pauling,* 331 F.2d at 799.

However, Appellants contend that "[w]hile the Executive made a political decision to secure the Chagos Islands, the Chagossians were subjected to egregious and illegal conduct during the depopulation process." Appellants' Br. at 13. Appellants claim that the manner in which the policy decision was implemented is distinct from the policy itself, and is thus reviewable. *Id.* (citing *Schneider,* 412 F.3d at 197; *DKT Memorial,* 810 F.2d at 1237; *Population Institute,* 797 F.2d 1062; and *Ramirez de Arellano,* 745

F.2d at 1515). Similarly, at oral argument, Appellants maintained that whereas the claims in *Schneider* may have been "inextricable from the broader policy" of encouraging a coup in Chile, the Chagossians' claims can be separated from the decision to establish the Diego Garcia base. Recording of Oral Arg. at 3:40-5:41.

We are unconvinced that the claims presented here merely "touch[ ]" on foreign policymaking. The specific tactical measures allegedly taken to depopulate the Chagos Archipelago and construct the Diego Garcia base are as inextricably intertwined with the underlying strategy of establishing a regional military presence as the alleged "neutralization" of General Schneider was with the policy of undermining Allende's government. *See Schneider,* 412 F.3d at 197. We are unconvinced by Appellants' efforts to distinguish this case from *Schneider;* the same logic that compelled our application of the political question doctrine in that case applies just as forcefully here.

In each case, the policy and its implementation constitute a sort of Möbius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken. Thus, just as we cannot review the decision to establish a base in the Indian Ocean (as Appellants concede), the same reasoning we applied in *Schneider* dictates that we cannot review the manner in which that decision was carried out. The political branches must "determine whether drastic measures should be taken in matters of foreign policy and national security," *id.,* and the President "must determine what degree of force [a] crisis demands,"

The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863).[5] We cannot second-guess the degree to which the executive was willing to burden itself by protecting the Chagossians' well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been. In this respect, the specific steps taken to establish the base did not merely touch on foreign policy, but rather constituted foreign policy decisions themselves. If we were to hold that the executive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence. The courts may not bind the executive's hands on matters such as these, whether directly – by restricting what may be done – or indirectly – by restricting how the executive may do it. Finally, while the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches, no such constitutional claims are at issue in this case. *Cf. People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 22 (D.C. Cir. 1999); *Harbury v. Deutch,* 233 F.3d 596, 603-04 (D.C. Cir. 2000), *rev'd in part, Christopher v. Harbury,* 536 U.S. 403 (2002).

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[5] *See also Fleming v. Page,* 50 U.S. (9 How.) 603, 615 (1850) (stating that as Commander in Chief of the nation's military forces, the President may "employ them in the manner he may deem most effectual"). While the current case does not involve battlefield decisions, the tactical and logistical details of establishing an overseas base are as much a matter of executive discretion as are strategic decisions.

VII

The same considerations that render nonjusticiable the claims against the United States also bar the claims against the individual Appellees. Even were Appellants to demonstrate that the individual Appellees' actions were not in conformance with presidential orders, the actions alleged were still closely enough connected to Appellees' employment to bring them within the ambit of the political question doctrine. *Cf. Schneider,* 412 F.3d at 199 ("Each of the claims for relief alleges acts by the Defendants which in the amended complaint consist only of the National Security Advisor and the United States. Their joint actions together can hardly be called anything other than foreign policy."). Although we need not resolve whether traditional agency principles guide the application of the political question doctrine, we have little trouble rejecting the claim that Appellees' acts fell outside the scope of their employment and therefore receive no shelter from the political question doctrine. The Restatement (Second) of Agency (1958) states:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement § 228(1).[6] "To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Restatement § 229(1).

Assuming the allegations are correct, the individual Appellees were authorized to depopulate the Chagos Archipelago and establish a military base on Diego Garcia. All the acts alleged to have harmed the Chagossians directly furthered, or at least were incidental to, this authorized goal. The individual Appellees were all high-level executive officers who inherently possessed a large measure of discretion in carrying out the tasks assigned to them by the President. When authorized acts allegedly included removing an entire community from their home islands, transferring them elsewhere, and replacing their community with a military base, the use of harsh measures in the course of completing the tasks cannot be unexpected. Thus, the actions alleged to have caused harm to Appellants would not have been outside the scope of Appellees' employment.

For this reason, the claims against the individual Appellees are barred by the same separation of powers concerns that prevent the court from examining the claims against the United States. Examining these claims would require the court to judge the validity and wisdom of the executive's foreign policy decisions, as Appellees' acts were

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[6] As we are not reaching the issue of Westfall certification, our discussion of the "scope of employment" is confined to the context of the political question doctrine; thus, we rely on general common law principles rather than the law of a specific state, as we would consult under Westfall. *Cf. Kimbro v. Velten*, 30 F.3d 1501, 1506 (D.C. Cir. 1994).

inextricably part of those policy decisions. This rationale does not entail some new form of immunity for executive officers who take actions in pursuit of foreign policy or national security goals; we merely hold that when the political question doctrine bars suit against the United States, this constitutional constraint cannot be circumvented merely by bringing claims against the individuals who committed the acts in question within the scope of their employment.

VIII

Hence, we conclude that all the claims in this case present nonjusticiable political questions. The judgment of the district court is therefore

Affirmed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5049 **September Term, 2005**

OLIVIER BANCOULT, ET AL.,
APPELLANTS

v.

ROBERT S. MCNAMARA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv02629)

Before: TATEL, BROWN and GRIFFITH, *Circuit Judges.*

JUDGMENT

(Filed Apr. 21, 2006)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael W. McGrail
Michael C. McGrail
Deputy Clerk

Date: April 21, 2006

Opinion for the court filed by Circuit Judge Brown.

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370 F. Supp. 2d 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVIER BANCOULT *et al.*,	:	
Plaintiffs,	:	Civil Action No.: 01-2629 (RMU)
v.	:	
ROBERT S. MCNAMARA *et al.*,	:	Document Nos.: 14, 16, 91
Defendants.	:	

MEMORANDUM OPINION

GRANTING THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS; GRANTING THE DEFENDANT UNITED STATES' MOTION TO DISMISS; AND DENYING THE PLAINTIFF'S SECOND MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

In the middle of the Indian Ocean and at the heart of this action lies the Chagos Archipelago ("Chagos"), a grouping of 52 islands administered by the British government and leased to the United States under the British Indian Ocean Territory Agreement ("BIOT Agreement"). During the late 1960s and early 1970s, the Chagos population was forcibly removed to nearby Mauritius and Seychelles to make way for a U.S. military facility. The plaintiffs in this case are persons indigenous to Chagos, their survivors or direct descendants, and organizations interested in the betterment of the Chagossian community. They bring this action against the United States and

various current and former officials of the Department of State and the Department of Defense[1] ("the individual defendants") for forced relocation, torture, racial discrimination, cruel, inhuman, and degrading treatment, genocide, intentional infliction of emotional distress, negligence, and trespass.

The individual defendants move to dismiss the complaint based on the statutory immunity granted to federal officers under the Federal Employee Liability Reform and Tort Compensation Act ("Westfall Act"), lack of subject-matter jurisdiction based on the political question doctrine, and on statute of limitation grounds. The United States moves to dismiss the complaint for lack of subject-matter jurisdiction based on sovereign immunity, the political question doctrine and lack of standing. The plaintiffs oppose these motions and move to strike the United States Attorney General's certification that the individual defendants were acting within the scope of their employment at the time of the alleged incidents. Also pending before the court is the plaintiff's second motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a), which seeks to enjoin the United States from denying the plaintiffs' request for a limited visit to Chagos.

Because the plaintiffs fail to rebut the Attorney General's certification that the individual defendants acted within their scope of employment when the events complained of took place, the court finds that the individual defendants are immune from suit under the Westfall

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[1] The individual defendants are: Donald H. Rumsfeld, Robert S. McNamara, Melvin R. Laird, James R. Schlessinger, Thomas Morrer, James L. Holloway, Eric D. Newsom, George T. Churchill.

Act and grants their motion to dismiss. As a result, the United States is substituted as the sole defendant. Because this suit raises nonjusticiable political questions and thus precludes this court's review, the court also grants the defendant United States' motion to dismiss. The court's order granting the individual defendants' and the United States' motions to dismiss renders the plaintiffs' second motion for a preliminary injunction moot. Accordingly, the court denies the plaintiffs' second motion for a preliminary injunction.

II. BACKGROUND

A. Factual Background[2]

Chagos is a grouping of small islands in the middle of the Indian Ocean, at least 1,000 miles away from the nearest landmasses of India, Mauritius, Australia, and the Gulf States. 2d Am. Compl. ¶ 10. Chagos includes the islands of Diego Garcia, Peros Banhos, Salomon, and numerous other small islands. *Id.* ¶ 8. Ceded to the United Kingdom by the French in 1814, Chagos became part of the British colony of Mauritius, and continues under British administration today. *Id.* ¶¶ 9-10. Its population, which numbered more than 550 in 1861, grew to approximately 1,000 inhabitants by the 1960s. *Id.* ¶¶ 8, 10. For over a century, the Chagossians established communities

[2] The facts are taken from the plaintiff's second amended complaint and the 1975 Congressional debates over the military base on Diego Garcia and the island's former inhabitants. While the defendants do not entirely dispute these facts, the court assumes that these facts are true for the purpose of ruling on the instant motions. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

by working at the local copra (coconut product) plantations, cultivating vegetables, raising animals, attending church, burying their dead, educating their children, and otherwise engaging in community life. *Id.* ¶ 11.

The plaintiffs allege that in 1964, the British and the United States governments entered into secret negotiations to establish a United States military facility in the Indian Ocean. *Id.* ¶ 17. According to the plaintiffs, the two governments conducted a survey and concluded that the construction of a military base in Diego Garcia would require the displacement of the entire indigenous population living in the island. *Id.* In 1965, at the request of the United States, the British government split Chagos from Mauritius before the latter became independent from Britain and incorporated the islands into the newly formed British Indian Ocean Territory ("BIOT"). *Id.* ¶ 9. The plaintiffs allege that between 1965 and 1973, the defendants and/or their agents forcibly removed, in stages, the Chagos population to Mauritius and Seychelles. *Id.* ¶¶ 21-23. During the first stage, the defendants and/or their agents blocked the plaintiffs' return to Chagos after travel outside the archipelago. *Id.* ¶ 22(a). In the second stage, the defendants imposed an embargo restricting the flow of food supplies to Chagos. *Id.* ¶ 22(b). Finally, the defendants and/or their agents physically corralled the population remaining on Diego Garcia and boarded them on overcrowded ships for Peros Banhos and Salomon, from whence they eventually were taken to Mauritius and Seychelles. *Id.* ¶¶ 22(c)-23. Diego Garcia, the largest of the Chagos islands, then became home to the proposed U.S. military facility. *Id.* ¶ 25.

In June of 1975, Congress debated the undergoing construction of a military facility on Diego Garcia. *See*

generally Diego Garcia, 1975; The Debate Over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcommittee on Investigations of the Committee on International Relations of the House of Representatives, 94th Cong., 1st Sess. 1-123 (1975) (hereinafter "The 1975 Congressional Debate Over Diego Garcia"). Congress met again on November 4, 1975, to address the removal of the Chagossian population from the Archipelago. *Id.* at 37-81. Members of Congress voiced harsh criticism at representatives from the Executive branch for not providing assistance to the Chagossian population and leaving those arrangements to the British and Mauritian governments. *Id.* at 46, 66, 68, 71. Notwithstanding the revelations made during these hearings, Congress appropriated funds to support the construction of a military base on Diego Garcia.

The plaintiffs in this action are three individuals and two organizations. Plaintiff Bancoult is a native Chagossian who alleges that in 1967, his family was prevented from returning home to Peros Banhos after a medical visit to Mauritius. *Id.* ¶ 31. Plaintiff Bancoult alleges that he and his family did not receive any relocation assistance and therefore suffered abject poverty in Mauritius. *Id.* Plaintiff Bancoult also alleges that he has been rejected repeatedly for employment on Diego Garcia. *Id.* Plaintiff Alexis is a native of Diego Garcia, who reports that in 1971 and 1972, persons acting on behalf of the U.S. and Britain forced her family and others to board a vessel from Diego Garcia to Peros Banhos and later, to Seychelles. *Id.* ¶ 32. She alleges that the harsh conditions of passage caused her pregnant mother to miscarry. *Id.* Plaintiff France-Charlot was born in Mauritius and is a first-generation descendant of Chagossians native to Salomon

Island. *Id.* ¶ 33. She alleges that as a result of the poverty her family endured in Mauritius, she suffered social, cultural, and economic oppression. *Id.* Plaintiffs Chagos Refugee Group and the Chagossian Committee (Seychelles) are organizations whose principal interest is the betterment of the Chagossian community in, respectively, Mauritius (including Agalega) and Seychelles. *Id.* ¶¶ 34-35.

B. Procedural History

In December 2001, the plaintiffs filed a complaint against the United States, the individual defendants, Halliburton, and a Mauritian company named De Chazal Du Mée & Cie ("DCDM"). A few months later, the plaintiffs moved for a preliminary injunction to bar the United States and DCDM from engaging in alleged employment discriminatory policies and practices. The United States, the individual defendants, and DCDM responded by filing motions to dismiss, while Halliburton responded with a motion to dismiss and for summary judgment. In September 2002, the court issued a memorandum opinion denying the plaintiffs' motion for a preliminary injunction, ordering further briefing on the United States' motion to dismiss for lack of subject-matter jurisdiction, and granting DCDM's motion to dismiss for ineffective service of process. *Bancoult v. McNamara,* 227 F. Supp. 2d 144 (D.D.C. 2002). In response to the court's order directing the plaintiffs to clarify their claims against the United States, the plaintiffs filed a supplemental memorandum stating that: (1) they base their claims on customary international law[3]

[3] Customary international law (also known as the law of nations) arises from the customs and usages of civilized nations. *Comm. of U.S.*

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and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; (2) they seek declaratory relief, injunctive relief, and restitution; (3) the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.,* provides a waiver of sovereign immunity; and (4) no waiver of sovereign immunity is necessary for violations of *jus cogens* norms.[4] Pls.' Supp. Br. at 1-14.

In November 2002, the plaintiffs moved for leave to amend their complaint to reinstate DCDM and add Brown & Root as defendants. The court issued a memorandum opinion granting the plaintiffs' motion with regard to the United States, the individual defendants, Halliburton, and Brown & Root, and denying the plaintiffs' motion with regard to DCDM. *Bancoult v. McNamara,* 214 F.R.D. 5 (D.D.C. 2003). After the plaintiffs filed their first amended complaint, all defendants renewed their respective motions. In response to the Halliburton and Brown & Root motions to dismiss and for summary judgment, the plaintiffs moved to permit discovery pursuant to Federal Rule of Civil Procedure 56(f).

In September 2003, the court denied the plaintiffs' motion to permit discovery and the plaintiffs' motion to enlarge time and set a revised briefing schedule. *Bancoult*

Citizens Living in Nicaragua. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); *Sanchez-Espinoza v. Reagan,* 770 F.2d 202, 206 (D.C. Cir. 1985).

[4] "A *jus cogens* norm is a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted[.]'" *Princz v. F.R.G.,* 26 F.3d 1166, 1173 (D.C. Cir. 1994) (citing *Comm. of U.S. Citizens Living in Nicaragua,* 859 F.2d at 940). "*Jus cogens* norms are a select and narrow subset of the norms recognized as customary international law." *Id.* at 1180 (Wald, J. dissenting) (citing *Comm. of U.S. Citizens Living in Nicaragua,* 859 F.2d at 940-41).

v. McNamara, 217 F.R.D. 280 (D.D.C. 2003). Subsequently, however, the plaintiffs moved to dismiss Halliburton and Brown & Root in light of "[r]ecent events occurring in parallel litigation in the United Kingdom." Pls.' Mot. to Dismiss at 1. The court granted the plaintiffs' motion. Minute Order dated Dec. 3, 2003. As a result of these actions, the United States and the individual defendants are the sole remaining defendants in the case.

On September 12, 2003, the plaintiffs filed a second motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a). In their second preliminary injunction, the plaintiffs seek to enjoin the United States from denying the plaintiffs' request for a limited visit to Chagos. Pls.' 2d Mot. for Prelim. Inj. at 1. In November 2003, the plaintiffs sought leave from the court to again amend their complaint to substitute a recently deceased plaintiff, Therese Mein, with her daughter, Jeanette Therese Alexis. The court granted the plaintiffs' motion for leave to amend their complaint. Minute Order dated Nov. 18, 2003.

On January 23, 2004, the plaintiffs moved the court to stay the case pending the Supreme Court decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). With the consent of both parties, the court granted the plaintiffs' request and stayed the case until the Supreme Court issued an opinion in *Sosa*. Order dated Mar. 26, 2004. On October 19, 2004, the court lifted the stay and directed the parties to submit further briefing regarding the impact of *Sosa* on the instant case. After issuing this order, the court reactivated all pending motions. The court now turns to the motions currently pending before it: the individual defendants' motion to dismiss, the United States' motion to

dismiss, and the plaintiffs' second motion for a preliminary injunction.

III. ANALYSIS

A. The Individual Defendants' Motion to Dismiss

1. Legal Standard for Immunity of Federal Officers Under the Westfall Act

The Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act") generally confers upon all federal officers and employees immunity for their "negligent or wrongful act[s] or omission[s]" while acting within the scope of their office or employment. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 28 U.S.C. §§ 2671-2680); *United States v. Smith,* 499 U.S. 160, 163 (1991). The statute further provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). In a case where the Attorney General, or by designation the United States Attorney in the district where the claim is brought, has filed a certification that the original defendant was acting within the scope of his employment, such certification has the following

consequences: (1) if the suit originated in state court, then the Attorney General or his designee is required to remove it to federal court; (2) the United States shall be substituted as the sole defendant; or (3) if the suit is not originally pursuant to the Federal Tort Claims Act (FTCA), then the suit is converted to one against the United States under the FTCA. 28 U.S.C. § 2679(d)(2); 28 C.F.R. § 15.3(a) (2002); *Haddon v. United States,* 68 F.3d 1420, 1423 (D.C. Cir. 1995). The certification is conclusive for purposes of removal; however, the substitution and conversion consequences are subject to judicial review, that is, they are contingent on whether the court finds that the original defendant acted within the scope of his employment. *See Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 434 (1995) (stating that "the Attorney General's certification that a federal employee was acting within the scope of his employment . . . does not conclusively establish as correct the substitution of the United States as defendant in place of the employee"); *Haddon,* 68 F.3d at 1423 (noting that "the federal court may independently determine whether the employee acted within the scope of employment and, therefore, whether to substitute the federal government as the proper defendant").

When the court reviews the validity of a certification filed by the Attorney General, the certification is entitled to "prima facie effect" that the defendants acted within the scope of their employment. *Kimbro v. Velten,* 30 F.3d 1501, 1509 (D.C. Cir. 1994) (internal citations omitted). The burden then shifts to the plaintiff to prove by a preponderance of the evidence that the defendants acted outside the scope of their employment. *Id.*; *Schneider v. Kissinger,* 310 F. Supp. 2d 251, 264 (D.D.C. 2004).

2. The Court Grants the Individual Defendants' Motion to Dismiss and Substitutes the United States in Their Place

The Attorney General's certification that the individual defendants acted within the scope of their employment is given "prima facie effect." *See Kimbro,* 30 F.3d at 1509; Individual Defs.' Mot. to Dismiss, Ex. 1 (Attorney General Certification). It is now the plaintiffs' burden to prove by a preponderance of the evidence that the defendants acted outside their scope of employment. *Id.* In an effort to meet their burden, the plaintiffs apply the law of the District of Columbia, where the alleged acts or omissions complained of presumably took place.[5] *See Hoston v. Silbert,* 681 F.2d 876, 878 (D.C. Cir. 1982) (noting that the FTCA calls for the application of the law where an act or omission took place); *Smith v. Grimes,* 798 F. Supp. 798, 800 (D.D.C. 1992) (stating that " 'the law of the place where the act or omission occurred' governs the scope of employment issue") (citations omitted). Under District of Columbia law, the conduct of a servant is within the scope of employment if:

> (1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the servant

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[5] The plaintiffs contend, and the defendants do not dispute, that for the claims pursuant to the *respondeat superior* doctrine, the law of the District of Columbia applies, that is, the acts or omissions complained of occurred in the District of Columbia. Pls.' Opp'n to the Individual Defs.' Mot. to Dismiss at 6; Individual Defs.' Mot. to Dismiss Reply at 2 (applying District of Columbia agency law to the scope of employment analysis).

> against another, the use of force is not unexpected by the master.

Haddon, 68 F.3d at 1423-24 (quoting Restatement (Second) of Agency § 228 (1957)).

In the instant matter, the plaintiffs move to strike the Attorney General's certification on the basis that the individual defendants' conduct constituted a violation of "*jus cogens* norms and fundamental human rights" and as such, these acts were not within the scope of their employment. Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 6-7. They allege that the individual defendants' actions, which the plaintiffs brand as genocide, torture, forced relocation, and cruel, inhuman, and degrading treatment, were not of the type the individual defendants were employed to perform. *Id.* at 8-9. Under D.C. law, however, an employee's conduct is of the kind he is employed to perform only to the extent it is "of 'the same general nature as that authorized' or 'incidental to the conduct authorized.'" *Haddon,* 68 F.3d at 1424 (quoting the Restatement (Second) of Agency § 229 (1957)). For an employee's conduct to be "incidental," it must be foreseeable. *Id.* "Foreseeable" means that the act or omission must be a "direct outgrowth" of the employee's job performance in carrying out his instructions or assignments. *Id.* (citations omitted).

The plaintiffs argue that the individual defendants' actions in removing the Chagossian population out of Chagos were "outrageous" and cannot be considered a direct outgrowth of their job assignment. Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 8. But in the vicarious liability context, the court's role is not to establish "whether the alleged conduct is deleterious or actionable;

rather, [the court is required to] determine *who* may be held liable for that conduct, an employee or his boss." *Schneider,* 310 F. Supp. 2d at 265. After all, the purpose behind the doctrine of *respondeat superior* is to "subject an employer to liability for 'whatever is done by the employee in virtue of his employment and in furtherance of its end.'" *Weinberg v. Johnson,* 518 A.2d 985, 988 (D.C. 1986) (citations omitted). In other words, an employer may be held liable for his employee's tortious acts, even though the employer did not hire him for that purpose. *Schneider,* 310 F. Supp. 2d at 265.

The court concludes that the individual defendants were acting within the scope of their employment when the events alleged by the plaintiffs occurred. From 1967 to 1975, the individual defendants worked in their official capacity for various federal agencies, including the Department of Defense, the State Department's Office of Political and Military Affairs, the State Department's Office of International Security Operations, the Bureau of Political Military Affairs, and the Secretary of the Navy. Individual Defs.' Mot to Dismiss at 3-4. The negotiations with Britain concerning the Chagos archipelago, the relocation of the Chagossian population to Mauritius and Seychelles, and the development and construction of a military base on Diego Garcia were activities undertaken by each of the individual defendants to further the U.S. government's national security interests, not their personal interests. *See Weinberg,* 518 A.2d at 990 (stating that "[t]he tort must be actuated, at least in part, by a purpose to further the master's business and not be unexpected in view of the servant's duties."); Individual Defs.' Mot. to Dismiss at 4; Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 10-11.

Even though the individual defendants' actions in establishing a base on Diego Garcia were within the scope of their employment, the plaintiffs contend that the force allegedly used by the individual defendants while removing the Chagossians from Chagos was never authorized. Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 10. As stated above, however, a tortious act is incidental when it is a "direct outgrowth" of the performance of an employee's instructions or job assignment. *Haddon,* 68 F.3d at 1424. The alleged improper misplacement of the plaintiffs by the individual defendants, if true, was incidental to the individual defendants' job in establishing a military base on Diego Garcia. There is no doubt that the relocation of a population of approximately 1,000 people would naturally create challenges for the native Chagossians and the governments of Great Britain and the United States. Nevertheless, the actions involved in relocating the Chagossian population cannot be said to have been unexpected or outside the individual defendants' scope of employment because they arose directly out of the United States' efforts to build a secured military facility in the Indian Ocean. Based on these considerations, the court concludes that the individual defendants were acting within the scope of their employment.

The court's analysis, however, does not end here. The plaintiffs still contend that the individual defendants can be held liable pursuant to two exceptions under the Westfall Act. Specifically, a grant of immunity under the Westfall Act does not apply when a civil action is "brought [1] for violations of the Constitution of the United States, or . . . [2] for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A)-(B). The plaintiffs

argue that their claims brought under the ATCA and international law fall within the second exception.

A waiver of immunity is provided by 28 U.S.C. § 2679(b)(2)(B) when federal officials or employees violate "a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). The plaintiffs argue that they can invoke a waiver of immunity for purposes of 28 U.S.C. § 2679(b)(2)(B) because the individual defendants violated the ATCA by committing torts "in violation of the law of nations[.]"[6] 28 U.S.C. § 1350; Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 12. They further assert that "[t]he plain meaning of the statute establishes that § 1350 is *both* a 'jurisdictional grant and a private right to sue for tortious violations of international law[.]'" Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 13 (quoting *Xuncax v. Gramajo,* 886 F. Supp. 162, 179 (D. Mass. 1995) (footnote omitted)). The Supreme Court, however, recently held that the ATCA is strictly a jurisdictional statute available to enforce a small number of international norms. *Sosa,* 124 S. Ct. at 2755, 2764. Before adapting the law of nations to private rights, the Court called all federal courts to exercise "great caution" and only allow norms that are "definite" and accepted "among civilized nations" to support a cause of action. *Id.* at 2765 (citations omitted).[7]

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[6] Pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or treaty of the United States." 28 U.S.C. § 1350.

[7] The Supreme Court in *Sosa* provided another reason for barring private causes of action for violations of international law. The Court warned that before recognizing these causes, the courts should consider "the potential implications for the foreign relations of the United States

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This review of *Sosa* shows that § 1350 of the ATCA facilitates the bringing of an action for violations of the law of nations. The plain language of ATCA, however, does not confer rights nor does it impose obligations or duties that, if violated, would trigger the § 2679(b)(2)(B) exception. For the § 2679(b)(2)(B) exception to apply, the ATCA would have to create substantive rights or duties that can be violated for purposes of the Westfall Act. *See Schneider,* 310 F. Supp. 2d at 267 (relying on *Alvarez-Machain v. United States,* 266 F.3d 1045, 1053-54 (9th Cir. 2001) for the proposition that "the ATCA itself cannot be violated for purposes of § 2679(b)(2)(B)"). A claim brought pursuant to the ATCA, therefore, is based on a violation of rights conferred under international law, not the ATCA. *Alvarez-Machain,* 266 F.3d at 1053 (citing *Smith,* 499 U.S. at 174). Accordingly, the court concludes that the plaintiffs fails to satisfy the exception under 28 U.S.C. § 2679(b)(2)(B).

The plaintiffs again attempt to obtain a waiver of immunity under 28 U.S.C. § 2679(b)(2)(B) by arguing that their cause of action "for violations of international law 'arises under' the laws of the United States for purposes of jurisdiction under 28 U.S.C. § 1331." Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 14. They claim that "federal common law incorporates international law," and thus that their case presents a federal question. Pls.' Opp'n to Individual Defs.' Mot. to Dismiss at 15 (citing *The Paquete Habana,* 175 U.S. 677, 700 (1900) and *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964)). The Westfall Act,

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. . . [and be] wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa,* 124 S.Ct. at 2763. A more thorough discussion of the foreign affairs concerns calling for a bar to judicial review of this case is presented *infra* Part III.B.3.

however, is explicit in allowing an exception only for "a violation of a statute of the United States [or] a violation of the Constitution of the United States," not federal common law or international law. 28 U.S.C. § 2679(b)(2)(A)-(B); *Schneider,* 310 F. Supp. 2d at 267. Moreover, the plaintiffs cannot bring suit for a violation of 28 U.S.C. § 1331 because this statute confers only federal question jurisdiction, not a cause of action for violations of international law. *Schneider,* 310 F. Supp. 2d at 267. Accordingly, the court concludes that the plaintiffs fails to satisfy 28 U.S.C. § 2679(b)(2)(B).

In sum, the plaintiffs fail to meet their burden of proving that the individual defendants acted outside the scope of their employment and thus fail to rebut the Attorney General's certification. The plaintiffs also fail to satisfy the statutory exception allowed under 28 U.S.C. § 2679(b)(2)(B) because neither the ATCA nor international law claims brought pursuant to 28 U.S.C. § 1331 confer any rights that can be violated for purposes of the Westfall Act. Therefore, the Attorney General's certification that the individual defendants acted within their scope of employment maintains its prima facie effect. Accordingly, the court grants the individual defendants' motion to dismiss and substitutes the United States in their place.

3. A Remedy Under the FTCA is not Available to the Plaintiffs

Once the liability of a federal officer or employee for common law torts committed within the scope of their employment is removed, the sole remedy available to the plaintiffs is to pursue an action against the United States

under the FTCA. 28 U.S.C. §§ 1346(b), 2679(b)(1); *see e.g., Smith,* 499 U.S. at 163.

a. Legal Standard for Exhaustion of Administrative Remedies Under the FTCA

The FTCA "grants federal district courts jurisdiction over claims arising from certain torts committed by federal employees in the scope of their employment, and waives the government's sovereign immunity from such claims." *Sloan v. Dep't of Housing & Urban Dev.,* 236 F.3d 756, 759 (D.C. Cir. 2001) (citing 28 U.S.C. §§ 1346(b) & 2674); *Richards v. United States,* 369 U.S. 1, 6 (1962) (stating that the FTCA "was designed to remove the sovereign immunity of the United States from suits in tort"). "The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States,* 508 U.S. 106, 113 (1993) (upholding the district court's dismissal of an unexhausted FTCA claim for lack of jurisdiction). Under the FTCA, exhaustion occurs once a claimant has presented the appropriate federal agency with a claim describing the alleged injury with particularity and setting forth a "sum certain" of damages, and the agency has (1) denied the claim in writing or (2) failed to provide a final disposition within six months of the claim's filing. 28 U.S.C. § 2675(a).

b. The Plaintiffs Failed to Exhaust Their Administrative Remedies

In the instant case the plaintiffs alerted the court that this suit "should not be construed as seeking relief under the FTCA" because the plaintiffs had yet to exhaust the

administrative remedies that are a prerequisite to bringing suit under the FTCA. 2d Am. Compl. ¶ 5. In response to the United States' motion to dismiss, the plaintiffs made an attempt to retract the above admission and argued that "all administrative remedies are effectively exhausted by Defendant United States' responsive filing." Pls.' Opp'n to Def.'s Mot. to Dismiss at 7. The plaintiffs' attempt to circumvent the requirements set forth under 28 U.S.C. § 2675(a) for the exhaustion of administrative remedies appears clear. However, "[a]llowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies . . . would render the exhaustion requirement meaningless and impose an unnecessary burden on the judicial system." *Schneider,* 310 F. Supp. 2d at 270 (quoting *Duplan v. Harper,* 188 F.3d 1195, 1199 (10th Cir. 1999)). The plaintiffs failed to present any evidence that they exhausted their administrative remedies. Rather the plaintiffs first admitted that they had not exhausted the prerequisite process under 28 U.S.C. § 2675, *see* 2d Am. Compl. ¶ 5, then changed their position to a blanket statement that opposition to their claims by the United States "effectively denied any potential administrative claims that arguable lie pursuant to the [FTCA.]" Pls' Opp'n to Defs.' Mot. to Dismiss at 7. The plaintiffs failed to show that they presented their claims to the appropriate federal agency and received a final disposition of the claims by that agency, as required by 28 U.S.C. § 2675. Therefore, the plaintiffs failed to persuade the court that they exhausted their administrative remedies, which in turn precludes this court from entertaining an FTCA suit against the United States.[8]

[8] Even if the plaintiffs could exhaust their administrative remedies by the United States' mere filing of a motion to dismiss, they would be precluded from bringing this suit under the headquarters doctrine of

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Accordingly, the court concludes that the plaintiffs cannot claim any waiver of sovereign immunity under the FTCA.

B. The United States' Motion to Dismiss

1. Legal Standard for Motions to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1).

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). Because "subject-matter jurisdiction is an 'Article III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982)). On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing

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the FTCA. *See* 28 U.S.C. 2680(k) (barring suits against the United States for claims arising in a foreign country). The Supreme Court in *Sosa* clarified that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa*, 124 S.Ct. at 2754. In this case, the alleged injuries suffered by the plaintiffs occurred in the Chagos islands, a territory of the Great Britain. As a result, adjudication of these claims would require the court to apply British law, which "the foreign country exception was meant to avoid." *Id.* at 2753; *see infra* note 9 (discussing the judicial decision by the British Queen's Bench regarding the plaintiffs claims). Due to the Supreme Court's clarification of the headquarters doctrine, the court concludes that the plaintiffs' claims would be barred because their injuries occurred on foreign soil.

that the court has subject-matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *Rasul v. Bush*, 215 F. Supp. 2d 55, 61 (D.D.C. 2002) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)). The court may dismiss a complaint for lack of subject-matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

2. Legal Standard for the Political Question Doctrine

The Supreme Court has explained that the political question doctrine bars judicial review when there are "controversies which revolve around policy choices and

value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 (1986); *Nixon v. United States,* 506 U.S. 224, 228 (1993) (noting that the political question doctrine excludes from judicial review controversies that the Constitution commits for resolution to the political branches) (citation omitted). The rationality behind this doctrine is that the "courts are fundamentally under equipped to formulate national policy or develop standards for matters not legal in nature." *Japan Whaling Ass'n,* 478 U.S. at 230 (quoting *United States ex rel. Joseph v. Cannon,* 642 F.2d 1373, 1379 (D.C. Cir. 1981)). To determine whether a case involves a political question, the court must examine six criteria:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). If any of these formulations is met, then the case is nonjusticiable. *Id.*; *Industria Panificadora, S.A. v. United States,* 763 F. Supp. 1154, 1159 (D.D.C. 1991), *aff'd,* 957 F.2d 886 (D.C. Cir. 1992).

3. The Court Grants the United States' Motion to Dismiss Because the Instant Case Raises Nonjusticiable Political Questions

a. The Conduct of Military Operations is Committed to a Coordinate Political Department

To determine if a case raises a nonjusticiable political question, the court must evaluate whether the text of the Constitution commits the disputed matter to the political branches. *Baker,* 369 U.S. at 217. When cases challenge our nation's foreign policy, the general rule is that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302 (1918) (citations omitted). Yet, as the Supreme Court states, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker,* 369 U.S. at 211. Foreign policy decisions concerning the conduct of our military operations, however, do not merely touch the realm of foreign affairs but rather involve serious political questions not within the province of the judicial branch. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948) (noting that "the very nature of executive decisions as to foreign policy is political, not judicial[;] . . . [t]hey are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry") (citations omitted). The

Supreme Court considers the conduct of military operations to be "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy,* 342 U.S. 580, 589 (1952) (citations omitted). In harmony with established precedent, the D.C. Circuit has explained that

> [t]he fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power [because such] matters are plainly the exclusive province of Congress and the Executive.

Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967); *see also Mahorner v. Bush,* 2003 WL 349713 (D.C. Cir. 2003) (affirming the district court's denial of a petitioner's motion to enjoin President Bush from using military force against Iraq because the plaintiff's claims presented nonjusticiable political questions).

Against this backdrop, the court now examines the plaintiffs' argument. The plaintiffs contend that "they do not seek to adjudicate the lawfulness or political wisdom of the United States' decision to negotiate with the United Kingdom, nor to establish a military base on Diego Garcia." Pls.' Opp'n to Def.'s Mot. to Dismiss at 10. Rather, they ask the court to assess "the legality of [the] Defendant's implementation of that policy." *Id.* The plaintiffs rely heavily on *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1511 (D.C. Cir. 1984) (en banc), *vacated on other grounds,* 471 U.S. 1113 (1985). Ramirez, a U.S. citizen and owner of a large cattle ranch in Honduras, challenged the occupation and destruction of his ranch by the United States military. *Id.* at 1506-08. Because Ramirez was a

U.S. citizen and was afforded the protections of the United States Constitution, namely the 5th Amendment, the court found that he had "a judicially cognizable interest in the affected property sufficient to enable [him] to sue for an unconstitutional deprivation of the use and enjoyment of that private property." *Id.* at 1516. The D.C. Circuit also concluded that Ramirez presented a justiciable claim because he did not object to the U.S. military presence in Honduras but rather sought "adjudication of the narrow issue whether the United States defendants may run military exercises throughout the plaintiff's private pastures when [his] land has not been fully expropriated." *Id.* at 1512.

Ramirez is distinguishable from the present case. First, in *Ramirez,* the court found that the United States and Honduran governments did not begin expropriating the plaintiff's land until after the suit commenced. *Id.* at 1509. In this case, however, the British and the United States governments entered into a diplomatic agreement before the United States could occupy the Chagos islands. *See* Availability of Certain Indian Ocean Islands for the Defense Purposes (BIOT Agreement), Dec. 30, 1966, U.S.-U.K., 18 U.S.T. 28. The removal of the Chagossian population from Chagos was also effected under British law and pursuant to the BIOT Agreement. *See* Def.'s Mot. to Dismiss, Ex. A. (The Immigration Ordinance 1971 of the British Indian Ocean Territory). And second, while the plaintiff in *Ramirez* was a U.S. citizen and was afforded the protection of the U.S. Constitution, the alien plaintiffs in this case do not enjoy those constitutional rights. *Johnson v. Eisentrager,* 339 U.S. 763, 784-85 (1950) (holding that Fifth Amendment protections do not extend to aliens outside the territory of the United States).

Because this particular matter involves the entry by the United States and Britain into an international agreement and the execution of this agreement pursuant to Britain's 1971 Immigration Ordinance, the political question doctrine precludes review of this case.[9] *See Antolok v. United States,* 873 F.2d 369, 381 (D.C. Cir. 1989) (noting that treaty negotiations are one area of foreign relations excluded from judicial review). Although the plaintiffs argue that they only challenge the implementation of the BIOT agreement, the plaintiffs are really asking the court to assess the reasonableness of the Executive Branch's decisions to (1) depopulate the Chagos islands and (2) ensure that the military base on Diego Garcia remains off-limits to non-authorized civilians. The court concludes that the Executive and Legislative Branches' conduct of military operations and foreign policy complained of in this case, which raise national security concerns, are "plainly the exclusive province of Congress and the Executive[,]" and thus are non-justiciable political questions. *Luftig,* 373 F.2d at 665-66.

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[9] The British judiciary has already considered the legality of the 1971 Immigration Ordinance in the case *Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs and Another,* Queens Bench Division, 2001 Q.B. 1067, 2000 WL 1629583 at *1104-06 (recognizing that the removal of the Chagossian population pursuant to the 1971 Immigration Ordinance, although conducted in a manner which was not conducive to the "peace, order and good government" of the British Indian Ocean Territory, was dictated by pressing military considerations).

b. The Resolution of This Suit Demands That the Court Move Beyond Areas of Judicial Expertise

The second of the six criteria set forth by the Supreme Court in *Baker* requires the court to examine whether there are judicially discoverable and manageable standards for resolving the case at hand. *Baker,* 369 U.S. at 217. If resolution of the suit demands the court to move beyond areas of judicial expertise, then the case is nonjusticiable. *Cf. Powell v. McCormack,* 395 U.S. 486, 548-49 (1969) (holding a petitioner's claim justiciable because interpretation of the Constitution "falls within the traditional role accorded [to the] courts"). In the instant matter, the plaintiffs argue that their lawsuit involves torts, which require "interpretation of the federal common law and customary international law." Pls.' Opp'n to Def.'s Mot. to Dismiss at 13. While tort liability is a matter within this court's expertise, it is the political nature of this case that bars judicial review. *See Industria Panificadora, S.A. v. United States,* 763 F. Supp. 1154, 1161 (D.D.C. 1991) (holding that there were no judicially manageable standards to examine whether the United States was negligent in failing to assign sufficient police power to patrol the city of Panama after the ousting of General Manuel Noriega); *Schneider,* 310 F. Supp. 2d at 261-62 (stating that there existed no judicially manageable standards to evaluate Dr. Henry Kissinger's actions in support of the 1973 Chilean coup and the kidnaping of a Chilean general). The allegations made in the complaint would require the court to assess whether it was proper for Britain and the United States to enter an agreement for the construction of a military based in Chagos thirty years ago. This would also demand the court to second-guess the initial and continuing decisions of the executive and legislative branches to

exclude civilians from Diego Garcia. Neither our federal law nor customary international law provide standards by which the court can measure and balance the foreign policy considerations at play in this case, such as the containment of the Soviet Union in the Indian Ocean thirty years ago and today, the support of military operations in the Middle East.[10] The court concludes that it is ill-equipped to review the conduct of the military operations challenged in this case because they implicate foreign policy and national security concerns, such as the current war on terror, which are best resolved by the political branches.

c. Judicial Resolution Would Require an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion

As discussed above, the Constitution delegates issues of foreign policy to the political departments of the government. *See Oetjen,* 246 U.S. at 302. An examination of the measures used to provide for national security would require the court to make "a policy determination of a kind clearly for nonjudicial discretion." *Baker,* 369 U.S. at 217. The plaintiffs claim that they do not seek "judicial monitoring of foreign policy in the Indian Ocean" nor the balancing of our nation's security interests with the plaintiffs' interest in returning to the islands. Pls.' Opp'n to Def.'s Mot. to Dismiss at 14. Although the plaintiffs try

[10] The United States contends that the military base on Diego Garcia supported and continues to support military endeavors, such as Operation Dessert Shield/Dessert Storm and Operation Enduring Freedom. Def.'s Mot. to Dismiss at 1.

not to challenge the Executive's decision to maintain a secure base on Diego Garcia, they are asking the court to substitute its judgment for that of the political branches and determine the national defense needs of the U.S. military in the Indian Ocean. Taking this action would force the court to step into the shoes of the political branches and issue a policy determination of a kind that does not fall within its judicial province. *Baker,* 369 U.S. at 217.

d. Other Prudential Considerations Counsel Against Judicial Intervention

Not only can the court not entertain this case pursuant to the prior three *Baker* factors, but there are further prudential considerations that counsel against judicial intervention. These considerations include: (1) expressing a lack of respect for the political branches; (2) adhering to a political decision already made; and (3) the potential for embarrassment from multifarious pronouncements by various departments on one question. *See Baker,* 369 U.S. at 217. The court now turns to these prudential considerations.

I. Lack of Respect

Intrusion by the judiciary into a matter that Congress and the Executive branch discussed and debated thirty years ago would force the court to show "a lack of respect due coordinate branches of government." *Baker,* 369 U.S. at 217. The plaintiffs, however, contend that "Congress never debated the circumstances surrounding the manner in which [the] plaintiffs were [removed] from their homes"

and therefore, the court's intervention would not cause it to express a lack of respect for the political branches. Pls.' Opp'n to Def.'s Mot. to Dismiss at 17. Even if the court could examine the plaintiffs' claims, the removal of the Chagossian population from Chagos was debated publicly by Congress and members of the Executive branch in 1975. *See* The 1975 Congressional Debate Over Diego Garcia at 37-62. The discussions centered on the mistreatment of the Chagossians by Great Britain and the United States, and certain allegations that the relocation of the Chagossian population had been accomplished through secret arrangements with Great Britain. *Id.* at 40-49. Despite these disclosures, Congress decided to provide funding for the construction of a military base on Diego Garcia. As a result, it is impossible for the court to resolve this case without condemning the Executive for mistreating the Chagossians while they were being relocated to Mauritius and Seychelles. At the same time, the court cannot entertain the plaintiffs' claims without condemning Congress for financing the construction of a base on Diego Garcia and failing to demand that the Executive ensure that Britain provide adequate compensation for the resettlement of its citizens. Accordingly, this case presents a nonjusticiable political question because it is impossible for the court to undertake an "independent resolution without expressing a lack of respect due coordinate branches of government." *Baker,* 369 U.S. at 217.

ii. Adherence to a Political Decision Already Made

As discussed above, the political branches of our government decided thirty years ago to build and expand their military operations on Diego Garcia, despite its

impact on the Chagossian population. The plaintiffs, however, continue to allege that the "specific circumstances" surrounding their claims were not fully aired during the 1975 hearings and therefore, there was no political decision that will require this court's adherence. Pls.' Opp'n to Def.'s Mot. to Dismiss at 16. The court disagrees. An examination of the 1975 Congressional record, amounting to 123 pages, reveals that members of Congress and the Executive branch addressed most of the claims that the plaintiffs bring before the court today. *See* The 1975 Congressional Debate Over Diego Garcia at 45-49 (listing the testimony and a report issued by former Senator John Culver of the House Committee on International Relations, which addressed the manner in which the Chagossians were treated by the United States and Great Britain, as well as their living conditions in Mauritius and Seychelles). The Congressional record also explains that the threat of Soviet expansion in the Middle East and Indian Ocean forced the Executive branch to enter into an agreement with Britain to build a military base on Diego Garcia. *Id.* at v, 1-36. Taking into account these national security concerns, Congress approved funding for the construction of the base. *Id.* at 62-63 (indicating that Congress appropriated $14 million dollars during fiscal year 1975 for the continued construction of the base). Contrary to the plaintiffs' averments, the record just examined demonstrates that the political branches explicitly chose, after Congress gave its approval, to build a military base on Diego Garcia. Accordingly, the court concludes that there is "unusual need for unquestioning adherence to a political decision already made." *Baker,* 369 U.S. at 217.

iii. Potential for Embarrassment from Multifarious Pronouncements by Various Departments

A third prudential consideration is that there is a potential for embarrassment if the judicial and the political branches make conflicting pronouncements on questions relating to foreign affairs. *Baker,* 369 U.S. at 217. The circumstances surrounding the establishment of a military base on Diego Garcia were the subject of sensitive debates among members of Congress and the Executive branch. Ultimately, the political branches made the decision to continue constructing the base and maintain a presence in the Indian Ocean, despite the situation of the Chagossian population. By adding its opinion to this medley of concerns, the court will disturb the government's "single voice" in the realm of foreign military policy and subject the judiciary and the political departments to potential embarrassment. The court concludes that this case raises a nonjusticiable political question due to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

Accordingly, after analyzing the *Baker* factors and for all these reasons, the court concludes that this case fits squarely within the nonjusticiable confines of the political question doctrine. Therefore, the court grants the defendant United States' motion to dismiss.

C. The Court Denies the Plaintiffs' Second Motion for a Preliminary Injunction

The court's order granting the individual defendants' and the United States' motions to dismiss renders the

plaintiffs' second motion for a preliminary injunction moot. Accordingly, the court denies the plaintiffs' second motion for a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, the court grants the individual defendants' motion to dismiss and the United States' motion to dismiss. The court also denies the plaintiffs' second motion for a preliminary injunction as moot. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 21st day of December 2004.

RICARDO M. URBINA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER BANCOULT *et al.*,	:	
Plaintiffs,	:	Civil Action No.:
v.	:	01-2629 (RMU)
ROBERT S. MCNAMARA, *et al.*,	:	Document Nos.: 14, 16, 91
Defendants.	:	

ORDER

GRANTING THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS; GRANTING THE DEFENDANT UNITED STATES' MOTION TO DISMISS; AND DENYING THE PLAINTIFF'S SECOND MOTION FOR A PRELIMINARY INJUNCTION

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 21st day of December 2004, it is

ORDERED that the individual defendants' motion to dismiss is **GRANTED**; and it is

FURTHERED ORDERED that the defendant United States' motion to dismiss is **GRANTED**; and it is

ORDERED that the plaintiff's second motion for a preliminary injunction is **DENIED.**

SO ORDERED.

RICARDO M. URBINA
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5049 **September Term, 2005**

01cv02629

Olivier Bancoult, et al.,
Appellants

v. **Filed On: (Jul. 11, 2006)**

Robert S. McNamara, et al.,
Appellees

BEFORE: Tatel, Brown, and Griffith, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed June 5, 2006, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
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No. 05-5049 **September Term, 2005**

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Olivier Bancoult, et al.,
Appellants

v. **Filed On: (Jul. 11, 2006)**

Robert S. McNamara, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson,* Randolph, Rogers, Tatel, Garland, Brown, Griffith,and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

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* Circuit Judge Henderson did not participate in this matter.

[ORAL ARGUMENT HEARD ON FEBRUARY 16, 2006]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5049

OLIVIER BANCOULT, *et al.*,

Appellants

v.

ROBERT S. McNAMARA, *et al.*,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING OR REHEARING *EN BANC*

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STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

Appellants petition for rehearing and rehearing *en banc of* the panel decision of April 21, 2006, pursuant to Fed. R. App. P. 40 and 35. They present the following issues:

(1) The panel decision conflicts with a recent ruling by the British High Court. *See The Queen ex parte Bancoult v. Secretary of State for Foreign and Commonwealth Affairs,* [2006] EWHC 1038 (Admin.) (*Bancoult II*). Reexamination of this case is necessary to

fully consider issues of privity, preclusion, comity, and remedy on an issue-by-issue, question-by-question basis, as well as for reasons of fundamental fairness.

(2) The panel decision conflicts with and misapplies decisions of the United States Supreme Court. *See, e.g., Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964); *Baker v. Carr,* 369 U.S. 186 (1962); *Paquete Habana,* 175 U.S. 677 (1900). Consideration by the full court is necessary to harmonize and ensure uniformity among this Court's decisions.

(3) The panel improperly applied the political question doctrine to bar adjudication of Appellants' claims.

COURSE OF PROCEEDINGS AND DISPOSITION

On December 21, 2004, the district court granted defendants' motion to dismiss pursuant to Fed. R. Civ. P 12(b)(1), and held that the political question doctrine rendered plaintiffs' claims nonjusticiable. *Bancoult v. McNamara,* 370 F. Supp. 2d 1, 17 (D.D.C. 2004). On April 21, 2006, this Court upheld the lower court's decision, and concluded that "all the claims in this case present nonjusticiable political questions." *Bancoult v. McNamara,* No. 05-5049, slip op. at 18 (D.C. Cir. Apr. 21, 2006).

STATEMENT OF FACTS

Mr. Olivier Bancoult, Ms. Jeanette Therese Alexis, and Ms. Marie Isabelle France-Charlot represent approximately 5,000 men, women, and children who were

either born in Chagos or are the direct descendants of native Chagossians. (Pls.' Second Am. Compl. ¶¶ 8, 31-33.) Modern-day Chagossians are descendents of slaves whom the French brought to the Chagos Archipelago in the 1780s to work on copra plantations. (Am. Compl. ¶ 10.) The Chagossians had developed communities and fostered their cultural identity on the archipelago. (Am. Compl. ¶¶ 10-15.)

In February 1964, the governments of the United States and the United Kingdom began discussing the possibility of establishing a United States military installation in the Chagos Archipelago. (Am. Compl. ¶ 17.) At the urging of American officials, the British detached the Chagos Archipelago from the Mauritius colony in November 1965, and created a separate dependent colony, the British Indian Ocean Territory. *Bancoult II* at ¶ 22. On December 30, 1966, British officials granted use of this territory to the United States for defense purposes, which included resettling any inhabitants. *Id.* ¶¶ 36-38. Fearful that the United Nations and the United States Congress would look unfavorably upon the forced removal of the native Chagossians, both governments fraudulently characterized the Chagossians as temporary workers. *Bancoult II*, ¶ 29; (Am. Compl. ¶ 20.) Classified documents given to Congress in the early 1970s referred to the Chagossians as "rotating contract personnel," and other documents downplayed the United States' role in removing the inhabitants. *See Diego Garcia, 1975: The Debate Over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcommittee on Investigations of the Committee on International Relations of the House of Representatives,* 94th Cong., 1st Sess. 1-123, 79-81 (1975); (Am. Compl. ¶ 20.)

From approximately 1965 until 1973, United States governme officials and/or their agents forced the Chagossia out of their homes in three distinct phases: first, preventing Chagossians who left the island from returning (Am. Compl. ¶¶ 21-22); second, creating an embargo to restrict the flow of food and supplies to the island in a direct effort to starve the Chagossians, while threatening some with death if they did not leave (Am. Compl. ¶ 22); and third, corralling the remaining Chagossians onto overcrowded and unsanitary boats to deposit them in Mauritius and Seychelles without providing any form of assistance or compensation for their relocation (Am. Compl. ¶¶ 22-23).

United States officials continue to deny the Chagossian people entry to the Chagos Archipelago and employment on the island of Diego Garcia solely on the basis of their ethnic heritage. (Am. Compl. ¶ 26.) In contrast, the United States routinely hires non-Chagossian laborers from Seychelles, Sri Lanka, the Phillipines, and Mauritius (Am. Compl. ¶ 26) and regularly permits vacationers and yachters to enter the island chain. *Bancoult II,* ¶ 98.

In 2000, the British High Court granted the Chagossians the right to return to the outlying islands of the Chagos Archipelago. *Bancoult II,* ¶ 80(iv). In 2004, the British Sovereign enacted two Orders in Council, which overturned the High Court's decision. *Id.* ¶¶ 3, 90-93. The Chagossians again brought suit in the British High Court and asked for a review of these Orders in Council. *Id.* ¶¶ 4, 99-109. In May 2006, the High Court reheard the case and set aside the challenged Orders in Council, thereby reinstating the Chagossians' right to return to their islands. *Id.* ¶¶ 163, 170.

ARGUMENT

I. RECENT DEVELOPMENTS IN APPELLANTS' U.K. LITIGATION NECESSITATE A REMAND

On May 11, 2006, in *Bancoult II,* the United Kingdom High Court held that violations of the Chagossians' rights are justiciable and that the Chagossians are entitled to return to their homeland. The U.S. participated in the litigation and the High Court issued its decision despite U.S. opposition to the Chagossians' claims. *Bancoult II,* ¶ 97. The decision should compel this Court to rehear the instant case to consider privity, preclusion, comity, and remedy on an issue-by-issue, question-by-question basis. The panel's decision rests on the premise that the British-American alliance compels great respect. The panel's own reasoning calls for a harmonization of the views of the two countries' judicial branches. *See Bancoult,* slip op. at 2 (noting the historic cooperation between the U.S. and U.K. regarding the joint use of military facilities). Fundamental fairness requires that this Court adjudicate Appellants' claims so that the question of Chagossian rights can be resolved with respect for comity between the United States and United Kingdom.

A. The High Court's Judgment Has Preclusive Effect in This Case

A final judgment on the merits, such as the High Court's judgment allowing the Chagossians to return to their homeland, binds the parties and their privies to the litigation.[1] *The Queen ex parte Bancoult v. Secretary of*

[1] This preclusive effect also applies in the international context. U.S. courts invoke issue preclusion to avoid relitigation of issues

(Continued on following page)

State for Foreign and Commonwealth Affairs, [2000] Q.B. 1067 (Admin.) (*Bancoult I*) at ¶¶ 62, 64, *available at* http://www.hmcourts-service.gov.uk/judgmentsfiles/j501/queen_v_fco.htm; *see Gill and Duffus Serves., Inc. v. A. M. Nural Islam,* 675 F.2d 404, 405-7 (D.C. Cir. 1982) (noting that "it is the general rule that a party defeated on the merits in a first action is thereby precluded from relitigating issues raised and necessarily decided in that action") (internal citation omitted). Preclusive effect applies not only in favor of the opposing party in the first action but also encompasses their privies and parties that had no part in the litigation. *See Gill and Duffus,* 675 F.2d at 406-7 (explaining the effect of offensive invocation of issue preclusion against parties in privity with the original defendant); Restatement (Second) of Judgments § 39, cmt. b, illus. 4 (1982) (noting that a victory by a plaintiff may bind a defendant's privies). A privy is a party identified in interest with a party to the former litigation that represents the "same legal right in respect to the subject matter of the case." *Advantage Healtl. Plan, Inc. v. Knight,* 139 F. Supp. 2d 108, 111 (D.C. Cir. 2001) (internal citation omitted). Appellees seek to enforce the same perceived right with regard to the subject matter of the case, namely the exclusion of the Chagossians from the outlying islands of the British Indian Ocean Territory. *Compare* (Appellees' Br. ¶ 26) (arguing that security considerations bar the

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determined by foreign courts based on comity considerations. *See Norex Petroleum Ltd. v. Access Indus., Inc.,* 416 F.3d 146, 150 (2d Cir. 2005) (explaining that comity is the basis for the preclusive effect accorded foreign judgments); *General Electric Co. v. Deutz A.G.,* 270 F.3d 144, 157 (3d Cir. 2001) ("parallel proceedings are ordinarily permitted to proceed simultaneously, at least until one has reached the stage where its ruling becomes *res judicata*").

Chagossians from returning to the outlying islands) *with Bancoult II*, ¶¶ 93-98 (considering the U.K. government's argument that security considerations require the exclusion of the Chagossians from the outlying islands). Appellees are therefore in privity with the British government, which entitles Appellants to the preclusive effects of the High Court's judgment.

In addition to their shared interest in the outcome of the British litigation, the United States is in privity with the British government due to its participation in, direction of, and proprietary interest in the litigation. In *Montana v. United States,* the Supreme Court stated that "one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." 440 U.S. 147, 154 (1979) (internal citation omitted). The High Court's judgment explicitly states that the United States was involved in the litigation and notes that at least two letters were written to the court to assist the United Kingdom. in its defense. *Bancoult II*, ¶ 97. These letters are clear evidence of United States participation in the litigation. Limited discovery is required to better understand the extent of U.S. control over the U.K. litigation.

Additionally, Appellees' proprietary interest in the outcome of the U.K. litigation is apparent because an adverse decision would affect their control over access to the archipelago. *See Montana,* 440 U.S. at 154 (stating, "These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved"). Resolution of the privity

issue requires limited discovery to determine the degree of United States involvement in and control over the British litigation. This type of review requires a remand to the District Court. Further briefing and argument is necessary to fully address the significance of U.S. participation in the British litigation and the proper resolution of the privity issue.

The United States is bound on certain issues by the British judgment. Collateral estoppel is appropriate where the issues in dispute were actually and necessarily determined, as well as "essential to the judgment," in a previous proceeding by a court of competent jurisdiction. *Synanon Church v. United States,* 820 F.2d 421, 427 (D.C. Cir. 1987) (deciding that a party's destruction of evidence was essential to the lower court's fraud determination); *see also Carr v. District of Columbia,* 646 F.2d 599, 605 (D.C. Cir. 1980) (noting that "offensive" issue preclusion is appropriate in certain cases). In both the U.S. and U.K. litigation, the primary dispute is Chagossian access to the outlying islands, which was litigated in the High Court. *See Bancoult* II, ¶¶ 99-170 (discussing the plaintiffs' pleadings and oral argument and deciding in favor of the plaintiffs). The High Court's judgment is final and the issue is essential to the judgment, thus binding the U.S. parties to this suit. A decision regarding the complex issues of collateral estoppel raised by the High Court's judgment requires detailed briefing and reargument and necessitates rehearing or remand.

B. The High Court's Judgment Demonstrates that the District Court is Well-Equipped to Adjudicate Appellants' Claims

Bancoult II demonstrates that courts do not need to invoke the political question doctrine to adjudicate issues that touch on foreign affairs. The Court of Appeals panel discussed extensively the Cold War context of the decision to build the military base, the difficulty of litigating foreign policy decisions, and necessary deference to the Executive, but failed to address the harms committed to the Chagossians and their need for a remedy. *See Bancoult,* slip op. at 16 ("If we were to hold that . . . the executive's actions in depopulating the island . . . had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence"). The decision to abdicate responsibility for minimum protections to a single branch of government, regardless of violations of treaties and international law, sweeps too broadly, for it sees the "case" as political rather than addressing the specific justiciable questions. *Baker,* 369 U.S. at 217. The U.K. Court, Appellants submit, takes the correct approach.

The High Court's decision begins its discussion of justiciability by noting important historical restrictions on Executive power and the long tradition of judicial review. *See Bancoult II,* ¶ 6. Defendants in *Bancoult II* argued, in a manner similar to defendants in this action, for an expansive construction of government power, stating, "the formula peace, order and good government confers full plenary legislative authority in respect of the relevant colony." *Id.* ¶ 128. The High Court recognized that this argument could be used to justify extreme human rights abuses. *Id.* ¶ 125 (stating, "If an Order in Council approved

the obtaining of evidence by torture in BIOT, the victim of torture would have no remedy in courts of this country unless there was an Act of Parliament which applied to BIOT and outlawed torture"). Recognizing the extreme nature of the exile of an entire population, the court termed the defendant's argument "repugnant" and emphasized that there are limits on Executive power. *See id.* ¶ 142. The High Court affirmed that if "the executive . . . does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged." *Id.* ¶ 159 (internal citations omitted). The Executive may establish policy, but the manner in which that policy is carried out is subject to judicial review.

C. Comity and Reciprocity Require Respect for the High Court's Judgment

Under the Foreign Sovereign Immunities Act of 1976 (FSIA), the Judiciary is restricted from interfering in issues concerning a sovereign's self-governance. 28 U.S.C. § 1602, *et seq.* (2000 ed. and Supp. II). Courts traditionally respect decisions of sovereign nations that concern any non-commercial activity. *See Saudi Arabia v. Nelson,* 507 U.S. 349, 351 (1993) (holding that an action alleging personal injury resulting from detention and torture by the Saudi government was not based on commercial activity). Although the Chagossians do not bring their claims under the FSIA, the principles embodied in the Act are applicable because international law and comity among nations are "codified in part by the FSIA." *TMR Energy Ltd. v. State Prop. Fund of Ukr.,* 411 F.3d 296, 300 (D.C. Cir. 2005).

Comity requires a remand of this case to accord proper attention to the High Court's judgment, which this Court should view as "prima facie evidence . . . of the truth" of the Chagossians' claims. *Hilton v. Guyot,* 159 U.S. 113, 123 (1895). Ultimately, "the general comity, utility, and convenience of nations have . . . established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution." *Id.* at 166 (quoting Wheat. Int. Law (8th Ed.) § 147).

This Court will deny the U.K. the right to control its sovereign territory by upholding the Court of Appeals' judgment, which effectively denies the Chagossians the right of return. The United States government has repeatedly argued in its briefs that the islands are sovereign territory of the British government.[2] (Appellees' Br. ¶¶ 9, 26) (stating, "the United States by itself has no authority to grant plaintiffs' the access they seek. Diego Garcia and the Chagos Archipelago remain under the exclusive sovereignty and control of the British Government."). The United States government has also argued that the British government controls the immigration and regulation of the Chagos Archipelago and that the British government's security concerns govern the Chagossians' continued exclusion from the islands. (Appellees' Br. ¶¶ 9-11, 26.) In light of the High Court's recent judgment, the United States should, as a matter of comity, respect the right of

[2] It is important to note that Britain's sovereignty over the islands does not mitigate the United States' role in the removal of the Chagossians. Appellants maintain that the United States government was a direct participant in the removal of the Chagossians and the torts committed during their removal and should be held accountable for those egregious acts. (Am. Compl. ¶¶ 17-30.)

the United Kingdom. to control its sovereign territory and allow British citizens to return to their homeland.[3]

II. THE PANEL MISTAKENLY HELD THAT THE COURT LACKS JURISDICTION TO HEAR APPELLANTS' CLAIMS BASED ON THE POLITICAL QUESTION DOCTRINE

This Court should not invoke the political question doctrine to preclude adjudication of the Chagossians' claims. The doctrine, as detailed in *Baker v. Carr,* mandates a case-by-case factual analysis that cautions against limiting jurisdiction for mere political cases. 369 U.S. at 217. The Chagossians' claims are of the type courts have consistently adjudicated with well-defined statutory and international law standards. *See Paquete Habana,* 175 U.S. 677 (1900) (ruling that the U.S. government's actions in commandeering fishing vessels during the Spanish-American War were justiciable and violated international law); *Banco Nacional de Cuba*, 376 U.S. 398 (1964) (ruling that a Cuban bank could bring claims against a U.S. broker despite strained relations between the U.S. and Cuba).

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[3] The Executive Branch has recently reaffirmed the importance of comity in international affairs: "More than two months after we granted certiorari, and a month before oral argument in this case, President Bush issued a memorandum that stated the United States would discharge its international obligations under the Avena judgment by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." *Medellin v. Dretke,* 544 U.S. 660, 663 (2005).

A. *Baker v. Carr* Demands a Discriminating Analysis When Determining Whether to Apply the Political Question Doctrine

The panel failed to employ a "discriminating analysis of the particular question posed" and relied on a blanket invocation of the political question doctrine to conclude that Appellants' claims are inextricable from the broader national security interest in establishing and maintaining the Diego Garcia military base. *See Baker,* 369 U.S. at 211 (stating that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"); *Kadic v Karadzic,* 70 F.3d 232, 248-49 (2d Cir. 1995) (holding that judges should not avoid addressing claims that tangentially relate to policy by "reflexively" invoking doctrines such as the political question doctrine).

Courts have the authority to examine the conduct of the Executive when faced with national security concerns. In *Hamdi v. Rumsfeld,* the Supreme Court acknowledged that military decisions are a function of the Executive branch but recognized that "the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government." 542 U.S. at 516-519, 533-36 (emphasis in original); *see also Rasul,* 542 U.S. at 470-473. Recent events confirm that the United States will hold military officials responsible for

their actions when they cause harm to foreign nationals within the context of military security.[4]

Deference to the Executive and Congress in military affairs wanes in cases that involve violations of individual rights. For example, courts have attempted to provide whatever redress possible in situations involving discrimination. *See Korematsu v. United States,* 584 F. Supp. 1406, 1413 (C.D. Cal. 1984) (deciding to grant a *writ of coram nobis* based on the government's wrongful concealment of facts to justify an unfair and discriminatory policy toward Japanese-Americans during World War II). The *Korematsu* court based its decision to grant a remedy on the plaintiffs introduction of new evidence that the government withheld information. Similarly, in light of the High Court's judgment that determined that the United States and the United Kingdom – through their representatives – were engaged in a joint enterprise that was designed to use force to expel the Chagossians, *Bancoult II,* ¶¶ 36-38, new evidence may be available that necessitates a remand to ensure a proper remedy.

Additionally, cases where the government dislocates an entire population based on an underlying military interest in the land in question are generally justiciable. *See Peter v. United States,* 6 Cl. Ct. 768, 778, 781 (1984) (denying sovereign immunity for breach of an implied-in-fact contract that resulted in the forcible removal of Enewatak islanders to conduct atomic testing, although

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[4] *See* Josh White & Spencer S. Hsu, *Army Plans to Prosecute Abu Ghraib Officer,* Wash. Post, Apr. 26, 2006, at A4 (charging a U.S. Lieutenant Colonel with seven separate violations of the Uniform Code of Military Justice for his involvement in the physical and sexual abuse of foreign detainees at Abu Ghraib).

the removal was "clearly related to and involved in the defense and foreign affairs of the United States"); *Juda v. United States*, 6 Cl. Ct. 441 (1984) (denying sovereign immunity for breach of implied-in-fact contract that resulted in the forcible removal of Marshall islanders as a result of atomic testing even though the program furthered foreign affairs and defense policy). These cases are factually similar to the Chagossians' claims and demonstrate that courts are willing and able to adjudicate forced relocations.

United States v. Causby illustrates how courts can separate executive policy from tort violations. 328 U.S. 256, 259-260 (1946). In *Causby,* a fanner brought suit after the use of an air force base located near his farm caused the death of all his livestock, thus destroying his business. *Id.* The Court found that the use of the air force base, even though it was the result of a national emergency, constituted a taking and distinguished between the government's right to use the base and the harm caused to Causby due to that use. *Id.* at 263-64. This Court could similarly separate the individual harms to the Chagossians from the use and construction of the military base and adjudicate the Chagossians' claims without questioning the existence of the base itself or the removal of the Chagossians.

B. Appellants' Claims are Distinguishable from the Claims in *Schneider v. Kissinger*

The facts of this case are distinguishable from *Schneider v. Kissinger.* 412 F.3d 190 (D.C. Cir. 2005). Appellants' claims *in Schneider* were not extricable from U.S. foreign policy during the Cold War because actions to

"neutralize" General Schneider were arguably necessary to destabilize the Allende government. *Id.* at 198. Appellants' claims, on the other hand, are extricable from U.S. foreign policy during the Cold War because the removal of the Chagossians from the outlying islands was not necessary for the establishment of the base and is not necessary for the continued existence of the base. This is evidenced by the presence of yachters, vacationers, and contract workers within the archipelago. *Bancoult II,* ¶¶ 26, 98. The panel did not apply a discriminating analysis, failing to note the factual differences between the two cases and improperly transposing the reasoning of *Schneider* to render Appellants' claims nonjusticiable. *Bancoult,* slip op. at 17 (citing *Schneider,* 412 F.3d at 195).

The panel's concern for the political circumstances surrounding the creation of the military base on Diego Garcia is understandable, but it obscures the necessary inquiry: proper invocation of the political question doctrine distinguishes between those actions that are inextricable from a foreign policy decision and those that are incidental to it. The assassination of General Schneider may have been central to Cold War security concerns, *Schneider,* 412 F.3d at 195-96, but the removal of the Chagossian islanders from the outlying islands has never been necessary because the Chagossians have never posed a national security threat. The U.S. government's present policy permitting foreign nationals to work on the base while denying employment to Chagossians is discriminatory. A review of the U.S. government's employment practices does not attack the greater policy of establishing a military base, but rather focuses separately on claims of discrimination.

C. Misinterpretation of the Statutory Mandate of the Alien Tort Claims Act Requires a Rehearing

The Alien Tort Claims Act (ATCA) sets forth statutory standards for evaluating harm to aliens. 28 U.S.C. § 1350 (2000). The statute explicitly permits aliens to seek the adjudication of violations of international law before U.S. courts regardless of whether they occur in a political context. *Id.*; *see also In re Agent Orange Product Liability Litigation*, 73 F. Supp. 2d 7 (2005) (holding that an action brought by Vietnamese nationals against manufacturers of herbicide used by American and allied military forces during the Vietnam War did not raise a nonjusticiable political question); *Tachiona v. Mugabe,* 234 F. Supp. 2d 401 (S.D.N.Y..2002) (finding the leading Zimbabwean Political Party guilty of violations of international law); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2000) (reviewing whether Shell Nigeria hired Nigerian police and military to attack local villages and suppress the organized opposition to Shell's development activity through torture, arrests, and murder).

The ATCA's statutory mandate permits the Appellants to come before this Court. In *Sosa v. Alvarez-Machain,* the Supreme Court stated, "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." 542 U.S. 692, 719 (2004) (internal quotations omitted). The *Sosa* Court thus bound the United States to the law of nations and set forth manageable standards for evaluating which claims could be considered under the ATCA. *See Sosa,* 692 U.S. at 725 (stating that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the

civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."). Appellants' claims are specifically-defined and well-recognized violations of international law that are extricable from the political context in which they derive.

Sosa clarified that both private actors and the United States are bound by the law of nations for violations of international law. *See id.* at 715 ("[t]here was finally a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships."). By invoking the political question doctrine, the panel avoided its statutory duty to uphold customary international law claims brought by aliens in United States courts. The ATCA allows adjudication of tort violations without questioning the underlying policy. The Court's discussion in *Sosa* illustrates how courts can evaluate tort violations outside the context in which they occur. *See id.* at 697-98 (emphasizing the nature of the tort rather then the political nature of the claim, which involved the sensitive issue of Mexican-U.S. foreign policy and the war on drugs). In ATCA cases, courts should therefore focus on the tort violation rather than the surrounding political circumstances.

CONCLUSION

The High Court of the United Kingdom has decided to allow the Chagossians to return to the outer lying islands of the British owned Chagos Archipelago, and the United States participated in this litigation. Respect for the sovereignty of the United Kingdom and for the "special relationship between the British Commonwealth . . . and

the United States," requires reconsideration of the instant case. *Bancoult,* slip op. at 2 (quoting *Blood, Toil, Tears, and Sweat: The Speeches of Winston Churchill,* at 301 (David Cannadine ed. 1989). The High Court's judgment illustrates that a court can consider the Chagossians' claims for relief and allow them to return to the outlying islands of the Chagos Archipelago without entering the realm of foreign policy choices constitutionally committed to the Executive. A case-by-case approach to the political question doctrine as prescribed by the Supreme Court in *Baker,* 369 U.S. at 211, reveals that the Chagossians' claims do not stem from an Executive policy decision, but rather from the tortious manner in which the defendants carried out this policy. The Supreme Court has demonstrated the appropriate method for adjudicating these claims under the mandate of the ATCA. *Sosa,* 542 U.S. at 725.

For the foregoing reasons, the panel should grant the petition for rehearing, and this Court should grant the petition for rehearing *en banc.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of June, 2006, I delivered by electronic mail and first class mail a true copy of the foregoing Petition for Rehearing and Rehearing *En Banc* to counsel for defendants as follows:

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 32(b)(5) AND 35(b)(2)

I hereby certify pursuant to F. R. App. P. 35(b)(2) that the length of Appellants' Petition for Rehearing and Rehearing *en banc* is 15 pages. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) because this petition has been prepared in a proportionally spaced typeface with 12 point Times New Roman font.

Marialejandra del-Cerro

ADDENDUM

CERTIFICATE AS TO PARTIES

The plaintiff-appellants, representing the class of Chagossian claimants, are Olivier Bancoult; Jeanette Therese Alexis, Marie Isabelle France-Chariot, Chagos Refugee Group, and the Chagossians Committee (Seychelles).

The defendants-appellees in the underlying litigation are Robert S. McNamara, Donald H. Rumsfeld, Admiral Thomas Moorer, Melvin R. Laird, James R. Schlesinger, George T. Churchill, Admiral James L. Holloway, III, Eric D. Newsom, and United States of America.

The following additional defendants were dismissed by the district court at an earlier stage: Halliburton Corporation, Brown and Root, and De Chazal Du Mee.

Supreme Court, U.S.
FILED
DEC 13 2006
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(2)

No. 06-502

In the Supreme Court of the United States

OLIVIER BANCOULT, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' lawsuit, which challenges the Executive Branch's negotiation and implementation of a formal agreement with the British Government during the Cold War to establish a military base on a British territory in the Indian Ocean, presents a nonjusticiable political question.

2. Whether petitioners' lawsuit is time-barred or suffers from other threshold defects that require dismissal.

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Miscellaneous:

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In the Supreme Court of the United States

No. 06-502

OLIVIER BANCOULT, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 445 F.3d 427. The opinion of the district court (Pet. App. 23-55) is reported at 370 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21-22) was entered on April 21, 2006. A petition for rehearing was denied on July 11, 2006 (Pet. App. 57). The petition for a writ of certiorari was filed on October 9, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this suit against former officials of the United States for alleged torts and violations of international law arising from the displacement of the

local population from the Chagos Archipelago, a British territorial possession in the Indian Ocean, following negotiations between the United States and Britain in the 1960s for the construction by the United States of a military base in the archipelago. Pet. App. 2-5. The district court dismissed petitioners' claims on the ground that they present nonjusticiable political questions, *id.* at 23-55, and the court of appeals affirmed, *id.* at 1-22.

A. Background

1. The Chagos Archipelago (Chagos) comprises 52 islands in the middle of the Indian Ocean, more than 1000 miles from the nearest landmasses of India, Africa, and Australia. Pet. App. 23, 25. The archipelago was ceded to Britain by France in 1814 and remains a British territory today. *Id.* at 25. Initially administered as part of the British colony of Mauritius, Chagos in 1965 was detached and reorganized into the British Indian Ocean Territory (BIOT). *Id.* at 26.

In the 1960s, when the events at issue in this case occurred, the population of the archipelago numbered approximately 1000. Pet. App. 25. Petitioners allege that in 1964, the United States entered into negotiations with the British government to establish a military base in the Indian Ocean. A survey concluded that the archipelago would provide a suitable location for such a facility. The survey also concluded, however, that to construct and operate such a facility, it would be necessary to displace the local population. *Id.* at 3, 26.

In 1966, by a formal exchange of notes between the United States government and the British government, the Chagos Archipelago was set aside for the defense needs of the two nations "for an indefinitely long period." See Availability of Certain Indian Ocean Islands

for Defense Purposes (BIOT Agreement), Dec. 30, 1966, U.S.-U.K., 18 U.S.T. 28, 30. Subsequently, as contemplated during the negotiation of the BIOT Agreement, the Commissioner for the BIOT adopted the Immigration Ordinance, 1971 (BIOT), pursuant to which the local population in the Chagos Archipelago was relocated to Mauritius and Seychelles. See generally *Regina (Bancoult)* v. *Secretary of State for Foreign & Commonwealth Affairs*, [2001] Q.B. 1067, 1075; see Pet. App. 47 ("The removal of the Chagossian population from Chagos was * * * effected under British law and pursuant to the BIOT Agreement."). Petitioners allege that the relocation took place in several stages between 1965 and 1973. *Id.* at 26.

2. With British consent, the United States built a military facility on Diego Garcia that quickly became a crucial base of operations for American forces in the Indian Ocean. Pet. App. 26. In 1975, military leaders requested funding for a major build-up of the base. Concerned about the military and foreign policy implications of an expanded Diego Garcia facility, including particularly the reaction of the Soviet Union, Congress refused to authorize construction until the President himself certified that a U.S. military facility on Diego Garcia was "essential to the national interest of the United States." See Military Construction Authorization Act, 1975, Pub. L. No. 93-552, § 613(a)(1), 88 Stat. 1766. On May 12, 1975, President Ford submitted the following certification to Congress:

> In accordance with * * * the Military Construction Authorization Act, 1975 (Public Law 93-552), I have evaluated all the military and foreign policy implications regarding the need for United States facilities at Diego Garcia. On the basis of this evalua-

> tion * * * I hereby certify that the construction of such facilities is essential to the national interest of the United States.

H.R. Doc. No. 140, 94th Cong., 1st Sess. 1.

Congress also held a series of hearings on issues related to the proposed base, including the fate of the people removed from the Chagos Archipelago. See generally *Diego Garcia, 1975: The Debate over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. (1975). After press accounts indicated that Britain had forced the relocation of people from Chagos, Members of Congress criticized the Executive Branch for leaving the local population's fate in the hands of the British and Mauritian governments. See *id.* at 46, 66, 68, 71. Nevertheless, Congress appropriated funds for the construction of the base on Diego Garcia, see Pet. App. 27, and since that time has repeatedly authorized funds for its expansion.[1] The base today provides a variety of critical support services to American and British forces deployed in the Middle East, including in Iraq and Afghanistan. See *id.* at 26-27, 50 n.10.

Notwithstanding the American military presence, the British government retains sovereignty over Diego Gar-

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[1] See, *e.g.*, Military Construction Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 2201(b), 116 Stat. 2687; Military Construction Authorization Act for Fiscal Year 1992, Pub. L. No. 102-90, § 2401(b), 105 Stat. 1530; Military Construction Authorization Act, 1988 and 1989, Pub. L. No. 100-180, § 2121(b), 101 Stat. 1189; Military Construction Authorization Act, 1986, Pub. L. No. 99-167, § 201(b), 99 Stat. 970; Military Construction Authorization Act, 1984, Pub. L. No. 98-115, § 201, 97 Stat. 765; Military Construction Authorization Act, 1981, Pub. L. No. 96-418, § 201, 94 Stat. 1755.

cia and the rest of the Chagos Archipelago. The 1966 BIOT Agreement expressly stipulates that "[t]he Territory shall remain under United Kingdom sovereignty." Para. 1, 18 U.S.T. at 28. Even U.S. military personnel are subject to British law while on Diego Garcia: the BIOT Agreement provides that "authorities of the Territory shall have jurisdiction over the members of the United States Forces with respect to offenses committed within the Territory and punishable by the law in force there." Annex II, para. 1(a)(ii), 18 U.S.T. at 34.

3. The displacement of people from the Chagos Archipelago is the subject of ongoing litigation in the British courts. On March 3, 1999, petitioner Olivier Bancoult filed an application for judicial review in the British courts to challenge the validity of the BIOT Immigration Ordinance, 1971. See *Regina (Bancoult)*, [2001] Q.B. at 1070. In November 2000, the British High Court (Queens Bench Division) declared that, although the dislocation of people from Chagos was undertaken for "good reasons * * * dictated by pressing considerations of military security," Section 4 of the 1971 ordinance was not a lawful measure for the "peace, order and good government of BIOT," and consequently was invalid. *Id.* at 1104.

In response, in June 2004, the Queen issued two Orders in Council prohibiting the former residents from returning to the Chagos Archipelago. Pet. App. 4 n.1. Those orders restored "full immigration control over the entire territory * * * for defence purposes." See *Foreign and Commonwealth Affairs: British Indian Ocean Territory*, 422 Parl. Deb., H.C. (6th ser.) 33WS (2004).[2]

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[2] Http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040615/wmstext/40615m03.htm.

Petitioners then brought a new suit in the British High Court of Justice (Administrative Court), and in May 2006 the court ruled in petitioners' favor. See *Regina (Bancoult)* v. *Secretary of State for Foreign & Commonwealth Affairs*, [2006] EWHC 1038 (Admin.). The British Government's appeal from that ruling is now pending.

B. Procedural History

1. Petitioners filed this putative class action in December 2001, seeking money damages (including punitive damages) on a variety of international law and common-law tort theories. Pet. App. 4-5. In December 2004, the district court accepted the government's scope-of-employment certification under the Westfall Act, and dismissed petitioners' claims against the individual federal officials in favor of claims against the United States under the Federal Tort Claims Act (FTCA). *Id.* at 31-39; see 28 U.S.C. 2679(d)(1); *United States* v. *Smith*, 499 U.S. 160, 163 (1991). The district court then dismissed petitioners' FTCA claims, concluding that petitioners had failed to exhaust their administrative remedies under 28 U.S.C. 2675(a) and that, in any event, any FTCA claim based on petitioners' removal from Chagos would be barred under the foreign country exception, see 28 U.S.C. 2680(k). Pet. App. 6, 39-42 & n.8.

Turning to petitioners' remaining claims, the district court determined that the merits of petitioners' challenge to the United States' policies in the Indian Ocean presented political questions beyond the court's power to adjudicate. Pet. App. 43-54. The court concluded that the gravamen of the suit was an attack on the Executive Branch's judgment and priorities in matters of interna-

tional diplomacy and national security, reasoning that such matters are "'plainly the province of Congress and the Executive[,]' and thus are non-justiciable political questions." *Id.* at 48 (quoting *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967)). Accordingly, the district court granted the government's motion to dismiss the suit as nonjusticiable. *Id.* at 55.

2. The court of appeals unanimously affirmed, holding that the action was properly dismissed on political question grounds. Pet. App. 1-20. In reaching that conclusion, the court followed the framework established by *Baker* v. *Carr*, 369 U.S. 186 (1962), and the court's recent application of the *Baker* factors in *Schneider* v. *Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006). See Pet. App. 10-13.

Petitioners conceded on appeal that "the decision to establish a military base on Diego Garcia" is not judicially reviewable, see Pet. App. 15, but asserted that the district court could nonetheless entertain damages claims challenging the particular manner in which the United States implemented that policy decision, see *ibid.* The court of appeals rejected that argument, explaining:

> [T]he policy and its implementation constitute a sort of Möbius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken. * * * We cannot second guess the degree to which the executive was willing to burden itself by protecting the Chagossians' well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been. * * * If we were to hold that the execu-

> tive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence.

Id. at 16-17. Because adjudicating petitioners' claims would thus "require the court to judge the validity and wisdom of the executive's foreign policy decisions," *id.* at 19, the court held that the claims against the United States were properly dismissed under the principles established by this Court in *Baker*.

The court of appeals also affirmed the dismissal of petitioners' claims against the individual federal defendants. Pet. App. 18-20. Without reaching the question whether the Westfall Act barred any claims against the individual defendants in favor of claims against the United States under the FTCA, the Court had "little trouble" rejecting petitioners' argument that the individual defendants' "acts fell outside the scope of their employment and therefore receive no shelter from the political question doctrine." *Id.* at 18, 19 n.6. The court observed that "[a]ll the acts alleged to have harmed the Chagossians directly furthered, or at least were incidental to, th[e] authorized goal" of depopulating the island and establishing a secure military base. *Id.* at 19. Accordingly, the court rejected petitioners' efforts to hold the individual defendants liable for conduct that would not be justiciable in a suit against the government: "[W]hen the political question doctrine bars suit against the United States, this constitutional constraint cannot be circumvented merely by bringing claims against the individuals who committed the acts in question within the scope of their employment." *Id.* at 20.

3. Petitioners petitioned for rehearing, arguing for the first time that the courts of the United States are bound by principles of comity and reciprocity to defer to the judgment of British courts concerning petitioners' right to return to the archipelago. See Pet. App. 68-75 (rehearing petition). The court of appeals denied the petition with no judge voting to grant rehearing. *Id.* at 57-58.

ARGUMENT

The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. This Court recently denied certiorari in a similar lawsuit that was dismissed on political question grounds. See *Schneider* v. *Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006). Further review is likewise not warranted here.

1. The court of appeals correctly held that petitioners' claims are not judicially cognizable. Petitioners' lawsuit attacks the Executive Branch's negotiation and implementation of a formal international agreement with a strategic ally for the establishment of a secure military base in the Indian Ocean during the height of the Cold War. As the court of appeals recognized, such claims are beyond the power of the federal courts to adjudicate. "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign

policy and national security are rarely proper subjects for judicial intervention.").

Here, the Executive Branch determined that critical national security considerations—including the spread of Soviet influence in the Indian Ocean region—required the United States to pursue the BIOT Agreement with Britain and build a military facility in the Indian Ocean notwithstanding the potential need for relocation of the local people. Congress, in turn, held hearings on the treatment of the local population, but ultimately approved the base and voted to fund its construction and operation. The courts may not now review those decisions through the prism of tort law. As the court of appeals explained, the federal judiciary "cannot second-guess the degree to which the executive was willing to burden itself by protecting the Chagossians' well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been." Pet. App. 17.

Petitioners insist that their claims would not require the courts to second-guess policy choices made by the Executive Branch in the exercise of powers textually committed to it by the Constitution, because "tort claims are governed by legal standards that courts are uniquely capable of discovering and applying." Pet. 20-21. In petitioners' view, senior Executive Branch officials were bound, on pain of damages, to take special care in negotiating the BIOT Agreement with the British Government to protect the interests of the local population—British territorial citizens. Yet petitioners make no attempt to explain how a federal court could meaningfully apply tort-law concepts of reasonableness and undue risk to the sort of diplomatic negotiations and national security judgments at issue here.

As the district court observed:

> The allegations made in the complaint would require the court to assess whether it was proper for Britain and the United States to enter an agreement for the construction of a military base[] in Chagos thirty years ago. This would also demand the court to second-guess the initial and continuing decisions of the executive and legislative branches to exclude civilians from Diego Garcia. Neither our federal law nor customary international law provide standards by which the court can measure and balance the foreign policy considerations at play in this case, such as the containment of the Soviet Union in the Indian Ocean thirty years ago and today, the support of military operations in the Middle East.

Pet. App. 49-50. As the District of Columbia Circuit recently stated in rejecting a similar lawsuit on political question grounds, "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments." *Schneider*, 412 F.3d at 197; see Pet. App. 10-12 (discussing *Schneider*).

Nor, in any event, could the United States by itself grant petitioners the access to Chagos that they demand. Diego Garcia and the Chagos Archipelago remain under the exclusive sovereignty and control of the British government, not the United States. For plaintiffs to prevail, the federal courts would be required to question, if not explicitly countermand, the United States' international agreements with the United Kingdom concerning civilians' rights of access to a British territory. As this Court's cases make clear, the Constitution for-

bids such a judicial reordering of the Nation's international commitments.

2. Petitioners do not contend that the decision below conflicts with the judgment of any other court of appeals. Rather, they contend that this Court's review is warranted because the District of Columbia Circuit's political question jurisprudence "confuses discretionary political question justiciability with a lack of federal jurisdiction under Article III," Pet. 10, and thus improperly "applie[s] the political question doctrine to limit subject matter jurisdiction." Pet. 9. That is incorrect.

This Court has characterized the political question doctrine as an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement" of Article III of the Constitution. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). The Court has explained that "the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Ibid.*; see *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to the political branches). The court of appeals' description of the political question doctrine as "jurisdictional" was therefore entirely consistent with this Court's own description of the doctrine. Pet. App. 7. In any event, even if the court of appeals's terminology were inapt, its reasoning and judgment are sound.

Similarly, petitioners contend that this Court's review is necessary because the District of Columbia Circuit did not engage in the careful justiciability inquiry

required by *Baker*, but rather "determine[d] that all claims are nonjusticiable if the general subject matter of the case is political." Pet. 14. The court of appeals did nothing of the sort. Indeed, the opinion below not only carefully discussed the *Baker* factors, *id.* at 10-13, but expressly stated that "[n]ot every political case presents a political question," Pet. App. 13, and that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *ibid.* (quoting *Baker*, 369 U.S. at 211). As the court of appeals explained, it was not the general subject matter of petitioners' claims that required dismissal under the political question doctrine, but petitioners' effort to impose tort liability on the United States and senior Executive Branch officials based on quintessential determinations of foreign policy and national security. See *id.* at 17 ("If we were to hold that the executive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence."). That approach fully comports with this Court's admonition that the political question doctrine requires "a discriminating analysis of the particular question posed" before dismissal will be justified. *Baker*, 369 U.S. at 211.

Petitioners also urge that the decision below disregards this Court's decision in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004). Petitioners theorize that if a claim under customary international law satisfies the criteria identified in *Sosa* for enforceability under the Alien Tort Statute, 28 U.S.C. 1350, then that claim necessarily does not present a political question. See Pet. 19-20. That unfounded argument, which petitioners raised for the

first time in their unsuccessful petition for rehearing, erroneously conflates the threshold question of justiciability with the existence of a viable cause of action. *Sosa* did not create an exception to the political question doctrine, and the Alien Tort Statute does not somehow render moot the structural constitutional concerns that animate that doctrine. Where, as here, the constitutional separation of powers precludes federal courts from passing on the policy determinations of the political branches, it makes no difference whether the underlying cause of action could otherwise be asserted under a statute.

3. In the alternative, petitioners urge the Court to accept review based on the court of appeals' alleged "fail[ure] to take into account parallel litigation in the United Kingdom." Pet. 25. Emphasizing their successes in pending litigation before the British High Court of Justice, petitioners assert that "[c]omity required the [District of Columbia] Circuit to remand this case to the District Court for proper attention to the British High Court's judgment." Pet. 26.

That contention is flawed in multiple respects. As an initial matter, although the parallel litigation in British courts was already pending when petitioners filed this appeal, petitioners failed to raise judicial "comity" as a basis for a remand until their petition for rehearing in the court of appeals. See Pet. App. 68. Because petitioners did not timely raise that argument, the court of appeals did not address it, and there is no warrant for this Court to resolve the issue in the first instance. Moreover, plaintiffs fail to explain how the decisions of the British High Court of Justice concerning the local population's right to return to the Chagos Archipelago under *British* law are actually inconsistent with the de-

cisions of the courts below, which addressed petitioners' claims under *United States* law.

In any event, considerations of international judicial comity cannot overcome the constitutional impediments to judicial review in this case. Because federal courts lack competence to decide political questions that the Constitution assigns to the political branches, see, *e.g.*, *Japan Whaling Ass'n*, 478 U.S. at 230; *Schlesinger*, 418 U.S. at 215; *Oetjen*, 246 U.S. at 302, the court of appeals correctly upheld dismissal of petitioners' complaint, irrespective of the progress of parallel litigation by the same plaintiffs in the courts of the United Kingdom.

4. Lastly, this Court's review is not warranted because petitioners' complaint also suffers from a variety of additional jurisdictional defects that the court of appeals had no occasion to reach. First, as the district court recognized, because the Attorney General has certified that the individual federal defendants were acting within the scope of their federal employment, the individual defendants are entitled to dismissal under the Westfall Act, 28 U.S.C. 2679(d)(1), with the United States substituted in their stead. See Pet. App. 31-39. Substitution of the United States under the Westfall Act is required even when relief against the government is precluded under the express terms of the Federal Tort Claims Act. See 28 U.S.C. 2679(d)(4); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 422 (1995); *United States* v. *Smith*, 499 U.S. 160, 166 (1991). That is the case here: by petitioners' own account, their alleged injuries arose exclusively in the Chagos Archipelago and on Mauritius, foreign jurisdictions governed by foreign law. Accordingly, under the so-called "foreign country exception" to the FTCA, 28 U.S.C. 2680(k), petitioners cannot avail themselves of the FTCA's limited waiver of

sovereign immunity, and their claims are consequently foreclosed. See Pet. App. 6, 41-42 n.8; *Sosa*, 542 U.S. at 712 ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

Petitioners' remaining claims against the United States are similarly flawed. Petitioners assert claims under the Alien Tort Statute and assorted principles of international law, but they identify no waiver of sovereign immunity that would permit such claims to proceed against the United States, and none exists. And in any case, petitioners' claims for relief are plainly time-barred. Petitioners contend that the depopulation of the Chagos Archipelago took place between 1965 and 1973. See Pet. 5; Pet. App. 3. This action was not filed until December 2001, nearly thirty years later. Plaintiffs have made no effort to explain why they could not have brought their claims earlier. Indeed, any such argument would seem to be foreclosed by the 1975 congressional hearings and the related press coverage, which exhaustively explored the United States' involvement in the depopulation of the Chagos Archipelago. See generally *Diego Garcia, 1975: The Debate over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. (1975). Whatever statute of limitations may apply to plaintiffs' customary international law claims, it clearly has run. Accordingly, even if judicial review were not precluded under the political question doctrine, dismissal of the complaint would nevertheless be required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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INTRODUCTION

Respondents' brief wrongly states that Petitioners' comity arguments were improperly raised and that this Court's review is therefore foreclosed. In addition, Respondents mischaracterize several of Petitioners' positions on justiciability. This reply attempts to clarify the record for this Court.

I. RESPONDENTS' COMITY ARGUMENTS FAIL TO RECOGNIZE PETITIONERS' CONSISTENT REFERENCE TO PARALLEL BRITISH LITIGATION AND THE LOWER COURTS' RELIANCE ON THE HISTORIC BRITISH/U.S. ALLIANCE

The government's arguments concerning comity are disingenuous. From its inception, this case has been part of a parallel litigation process that seeks to address the responsibility of U.S. and UK officials who perpetrated wrongs against the Chagossians. Petitioners have continuously informed the lower courts of this parallel litigation. Indeed, the complaint referred to both the British litigation (Compl. ¶ 8) (citing *The Queen v. Secretary of State for the Foreign and Commonwealth Office: ex parte Bancoult* 2 W.L.R. 1219 (QBD (Admin. Ct.)) (2000)) and principles of comity. (Compl. ¶ 3(h)) ("The following . . . form the basis of Plaintiffs' cause of action. . . . Customary international law and principles of comity . . . ").

Petitioners have also informed the U.S. District Court of developments in the UK litigation. For example, the Plaintiffs' Proposed Order for Preliminary Injunction specifically reported the British High Court's November 2000 decision and the problems posed by U.S. refusal to comply with that decision. (Pls.' Proposed Order for Prelim. Inj. 3, 9,

18-19; *see also* Pls.' Opp'n to Def. United States of America Mot. to Dismiss 3; Pls.' Consol. Opp'n to Individual Fed. Def.'s Mot. to Dismiss and Cross-mot. to Strike Certification of Scope of Employment p. 5, 34-35; Second Am. Compl. ¶ 8; First Am. Compl. ¶ 8) (referring to parallel litigation in Britain).

Moreover, the U.S. government took an active role in the British litigation without informing Petitioners or the U.S. courts of its participation in these proceedings. *See Bancoult II* ¶ 97. Petitioners discovered the U.S. government's participation in the British litigation from UK counsel. It is therefore incorrect to claim that the government or the U.S. courts were somehow unfairly left in the dark. Indeed, one wonders why government counsel, whose factual submissions and legal arguments were soundly rejected by the British High Court, did not bring these matters to the attention of the U.S. courts.

The Court of Appeals also relied on principles of comity in its decision in this case, emphasizing the "special relationship between the British Commonwealth and Empire and the United States." *Bancoult v. McNamara*, 445 F.3d 427, 429 (D.C. Cir. 2005) (quoting *Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill* 301 (David Cannadine ed., 1989)). After the Court of Appeals decision, the British High Court overruled the Queen's 2004 Orders in Council and found that the Chagossians' claims were valid and justiciable. *The Queen ex parte Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin.) (*Bancoult II*). This judgment necessitates further inquiry into Petitioner's claims in accordance with the Court of Appeals reliance on the historic British/U.S. relationship. *Id.* In an effort to keep the U.S. courts informed and allow them to

consider recent developments in the British litigation, Petitioners filed a rehearing petition less than one month after the British High Court handed down its decision. (Pls.' Pet. for Reh'g or Reh'g En Banc.)

II. RESPONDENTS' POSITIONS ON JUSTICIABILITY ARE FACTUALLY INCORRECT

Respondents mischaracterize Petitioners' political question arguments in several instances. The government states that Petitioners question the validity of the BIOT agreement and the subsequent removal of the Chagossian population. Resp.ts' Br. 9-10. Rather than challenging the Executive's ability to negotiate the BIOT agreement with Britain and to depopulate Diego Garcia to further U.S. national security interests, Petitioners challenge the torture and starvation of the Chagossians during their removal. The U.S. government could have achieved its policy objective of establishing a military base without the use of torture and starvation.

Petitioners have consistently argued that the government is liable because of the manner in which it *implemented* the BIOT agreement, not the validity of the agreement itself. This distinction is vital because courts typically allow challenges to the legality of the implementation of policy while declining to consider the propriety of the underlying policy decision. *See, e.g., Lamont v. Woods*, 948 F.2d 825, 833 (2d Cir. 1991) (holding that the case did not present a nonjusticiable political question because it challenged the implementation of a policy decision); *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 655-56 (2d Cir. 1988) (citations omitted) ("While courts are not competent to formulate national

policy or to review controversies which 'revolve around policy choices and value determinations constitutionally committed' to Congress or the executive branch, it is a court's duty to determine whether the political branches, in exercising their powers, have 'chosen a constitutionally permissible means of implementing that power.'"); *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("We reject the district court's suggestion that appellants' challenges to AID's actions present nonjusticiable political questions. This court recently held that whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs."). Petitioners have consistently limited the scope of review to the legality of the Executive Branch's implementation of its agreement with the British government. *See* Appellants' Br. 8-16 (acknowledging that the agreement between the U.S. and the UK to depopulate the Chagos islands was beyond the scope of review while challenging the legality of Executive actions taken to implement the agreement); Second Am. Compl. ¶¶ 21-30 (seeking damages based on the actions Respondents took in violation of international law).

Respondents also argue that Petitioners wish to exclude consideration of the "threshold question of justiciability" through discussion of this Court's statements on justiciability in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Resp.ts' Br. 14. This is another mischaracterization of Petitioners' arguments. Petitioners wish this Court to "clarify the interplay between the 'discriminating inquiry' required by *Baker* and the analysis required by *Sosa*." Pet.rs' Br. 17 (internal citations omitted). The proper

application of *Sosa's* justiciability discussion in light of the *Baker* factors is a vital federal question. *Baker v. Carr*, 369 U.S. 186 (1960); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the petition for certiorari.

Respectfully submitted,

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